

# INFORMATION

FOR

## MUNGO CAMPBELL,

Late OFFICER of Excise at SALTCOATS,

In a CRIMINAL PROSECUTION before the

## HIGH COURT of JUSTICIARY

in SCOTLAND,

For the alledged Murder of the late

## ALEXANDER EARL of EGLINTON:

## ARCHIBALD, now EARL of EGLINTON,

AND

## JAMES MONTGOMERY, Esq;

His MAJESTY's Advocate,

## PROSECUTORS.

By JOHN MACLAURIN, Esq; ADVOCATE.

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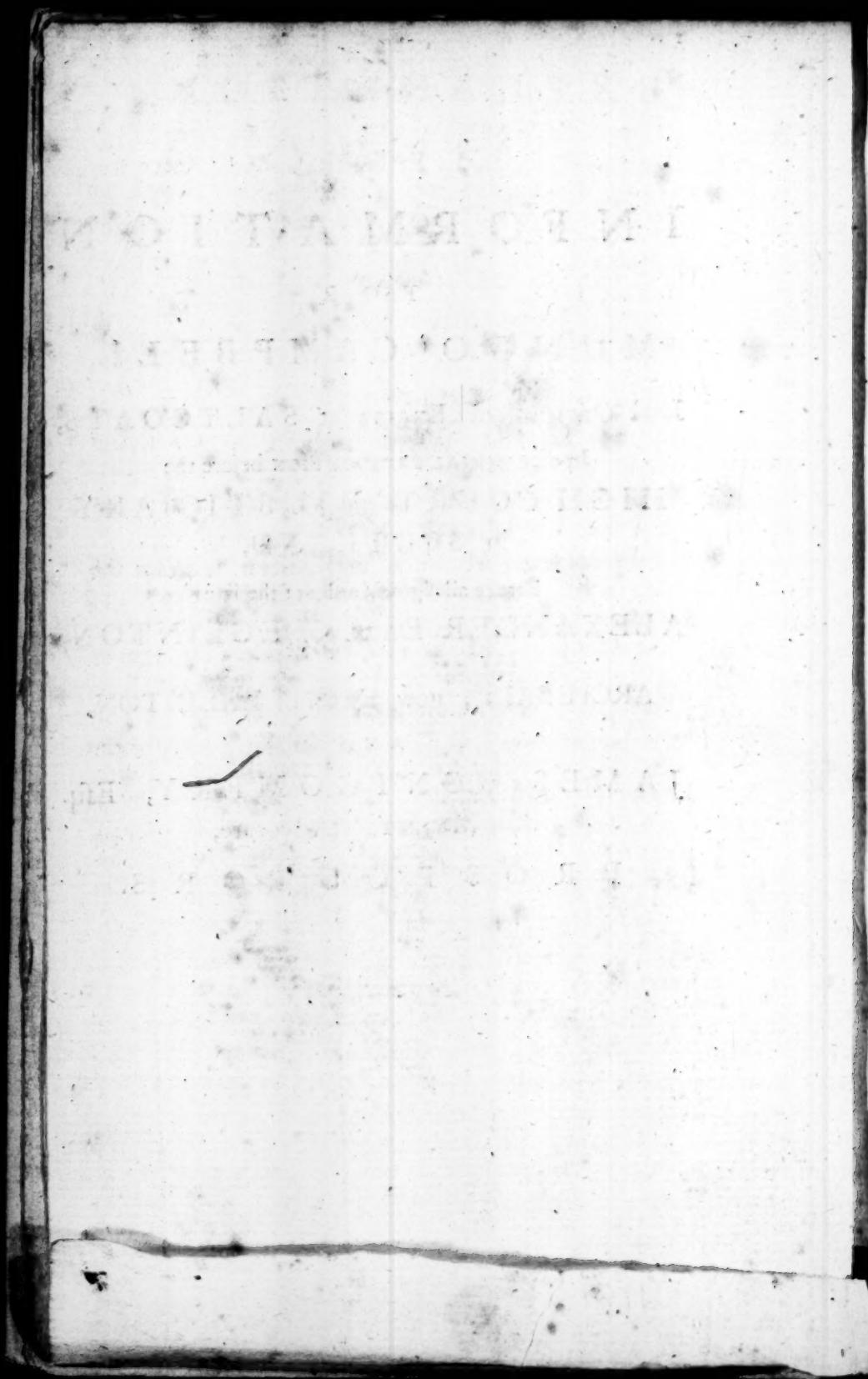
## ARCHIBALD, now EARL of EGLINTON,

AND

## JAMES MONTGOMERY, Esq.

His MAJESTY's Advocate,

## PROSECUTORS.



## E X P L A N A T I O N.

The Line A, B, C, D, E, F, G, H, I, K, L, shews the way that Mr. Campbell and Mr. Brown went from Salt-coats to the place at b, where they did meet with the late Earl of Eglintoun.

::::::: is a road inclosed on each side.

..... a road inclosed on one side.

::::::: a road that is not enclosed.

a, the place where his Lordship left the coach.

b, the place where his Lordship found Mr. Campbell, and is distant from a 228 ells, and from the tide mark 36 ells.

c, the place where Mr. Campbell did fall, and is distant from b 120 ells.

e, is the place where Mr. Brown stood, when he heard the report of Mr. Campbell's gun, and is distant from c 432 ells.

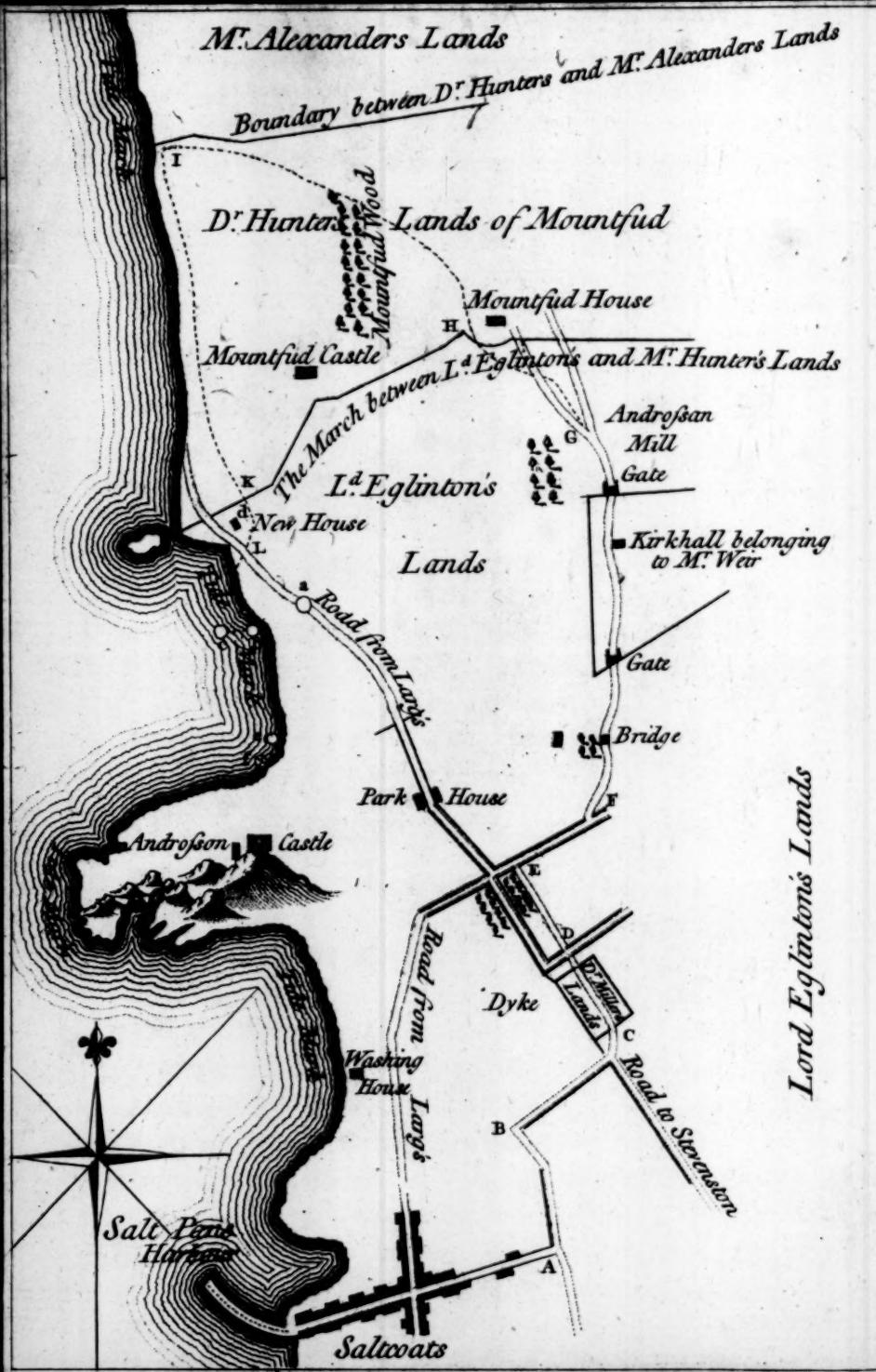
f, is the place where Mr. Campbell did seize a cart-load of spirits from Bartleymore.

d, is the new house of Ardroffan.

The ground at letter I, is high, commanding a view of the shore, particularly the spots called Castle-craigs, Horse-isle, and foot of Montfod burn, to which smugglers resort.

Montfod burn is the march betwixt Lord Eglinton's grounds and Doctor Hunter's, and runs towards the Horse-isle betwixt letters K, and L.

*PLAN of the Roads from Saltcoats to Largs Kirkhall &c.*



January 22, 1770.

# INFORMATION

FOR

MUNGO CAMPBELL,  
late Officer of Excise at *Saltcoats*, now Prisoner  
in the Tolbooth of *Edinburgb*, Panel;

AGAINST

ARCHIBALD EARL of EGLINTON,

AND

JAMES MONTGOMERY, Esq;  
his MAJESTY's Advocate, for his MAJESTY's  
Interest, Prosecutors.

**T**HE purpose of this information is to show that the indictment is not relevant, or, in other words, that the facts charged in it are not sufficient to infer the conclusion.

In the argument upon this question, it must be supposed, no doubt, that the facts set forth in the indictment are true; the panel, however, before entering upon the reasoning, thinks it his duty to premise a short account of himself, his family and conduct, with a full and fair detail of the circumstances of

A the

the unhappy accident that has brought him to trial for his life. Such explanations, on his part, are proper and necessary; as they will open what will be the nature of the exculpatory evidence, in case this indictment shall go to proof; and as they will contradict and confute the injurious misrepresentations with which, ever since his confinement, infinite pains have been taken to load him.

The panel was born at Air in 1712. He was one of twenty-four children. His father was Mungo Campbell, late Provost of Air; a man much respected in his time as a merchant and a magistrate. He had likewise the advantage of most honourable birth, being descended, both by father and mother, of the ancient and noble families of Cessnock (now Marchmont) Loudon, and Argyle.

The panel's father traded to what was a very great extent in those days, but he was not successful. On one bottom that perished at sea, he lost 30,000 merks, a great sum at that time; and he met with many other losses afterwards, which, with the expence of maintaining a family uncommonly numerous, greatly reduced his fortune; so that he died in very indifferent circumstances, and his children were dispersed among the several relations and friends of the family.

The

The panel, who was an infant at his father's death, was taken care of by his god-father, Cornet Mungo Campbell: That gentleman died some few years after the panel's father, and had the kindness to bequeath the panel, by his latter-will, 1000 merks, and to recommend him to the protection of their common kinsman, Mr. Campbell of Nether-place, who took him into his family, and educated him, as he did his own sons, till he was about 18 years of age.

The panel determined to go into the army, as he had not money to carry on trade, or breed him to any of the learned professions; and an additional motive was, that he had a cousin, Hugh Campbell, who had entered a cadet in the regiment called the Scots Greys; which regiment too was at that time commanded by a gentleman who was the panel's namesake and distant relation. On these accounts the panel fondly hoped, that his good behaviour might attain preferment; but in this he was disappointed; for twelve long years did he serve, and expose himself in the battle of Dettingen, and other engagements, unrewarded. This was the case too with several others, and particularly Henry Lyon of the Strathmore family, and his cousin, Hugh Campbell, who served 28 years in the same regiment, without being advanced; which at last made him leave it in disgust,

and go a volunteer to Carthagena, with the late Lord Cathcart, where he was killed. The panel's disappointment was no doubt chiefly owing to certain circumstances, which gentlemen who have been in the army will be at no loss to understand; they know well that neither merit or connections are always sufficient to obtain preferment. The panel was once, however, offered a Quarter-master's place, which was worth 300 l. Sterling, if he would advance 100 l. for it. The panel had not the money himself, nor could he think (such was his temper) of soliciting a loan from strangers, or even blood-relations, if not very near. He had a sister who was married to a man of substance; to her he applied for the sum, but she either could not, or would not, advance it; upon which the panel, disgusted and disappointed, applied for, and obtained his discharge from the service, which is as follows :

“ By Major Alexander Forbes, of his Ma-  
“ jesty's royal regiment of North-British  
“ dragoons, commanded by the honour-  
“ able Lieutenant-General Sir James  
“ Campbell.

“ These are to certify, that the bearer,  
“ Mungo Campbell, hath served in General  
“ Campbell's troop of the said regiment for  
“ the space of twelve years, honestly and  
“ faithfully; but by earnest solicitation, and

“ at

" at his own request, is hereby discharged  
 " from any further service, he having re-  
 " ceived his full pay, arrears of pay, and  
 " all just demands, during his said service,  
 " and four weeks pay to carry him home.  
 " Given under my hand and seal, at Ghent,  
 " this fourth day of December 1744.

" AL. FORBES."

The panel ingrosses this discharge, because, among the many aspersions that have been thrown upon him, this was one, that he had been drummed out of the brave and honourable regiment of Scots Greys on account of gross misconduct and misbehaviour.

Upon obtaining his discharge the panel returned to Scotland in 1745, when he found his countrymen in arms against one another. His chief and kinsman, the Earl of Loudon, did him the honour to countenance him, and the panel accompanied his lordship to the Highlands in that year. After their return, Lord Loudon procured him a commission as an officer of excise, with a recommendation, which the panel earnestly desired, to station him somewhere in Ayrshire, that he might be near his friends, his relations, and his native spot, to which he has all along felt the warmest attachment.

Upon this duty he entered in 1746, and was first stationed at Newmills in Ayrshire,  
 from

from which he was removed to Stewarton, from Stewarton to Irvine, and from Irvine to Saltcoats ; all places in the shire of Ayr, in which the panel chose to remain on account of his love to the *natale solum*. This was one reason why he was not raised to a higher station ; his incapacity to solicit, perhaps, was another : But the panel would rather have chose to remain in the humble station he held in Ayrshire, or near it, than to have rose to a higher, that would have obliged him to reside elsewhere. Besides, his duty in Ayrshire was attended with very little trouble and fatigue, to which he very probably might have been exposed in acting as a superior officer in another place, for which he was very unfit at that time, having had his health impaired by the hard duty abroad, which brought on a disorder in the lungs ; and having had the misfortune to break a leg some years after his return home.

The character of an excise officer is by no means popular in this country, yet the panel conducted himself so as to be well liked and countenanced by all ranks of people. To the poor he cannot say he was liberal, for he had but little to give. His income was narrow ; but as he had no family, till very lately, he had something to spare. What he gave, trifle as it was, he gave with compassion and kindness ; it was gratefully received ; and he must do them

and himself the justice to say, that die, when he may, he will be regreted by all the inhabitants of every village in which he had occasion to reside. As for the gentlemen of rank in the different parts of the country where he lived, he was by birth their equal, by education not their inferior, by his behaviour not their disgrace; and he always kept their company, and received from them all the marks of friendship and esteem. He had licences to hunt upon their grounds, if he inclined, from most of them; particularly the Earl of Marchmont's commissioner the Earl of Loudon, Mr. Alexander of Boydstone, Doctor Hunter of Montfod, and many others, some of which licences he preserved, and they are produced: the rest can easily be proved if necessary. The written licenses produced, not only allow him to hunt, but authorise him to preserve the game, and prosecute poachers. \* These licences he used but some times, as the sport of hunting, however agreeable and suitable to him in his youth, he found, when keenly pur-

At Sorabey, this thirteenth of  
April 1752.

\* I Hugh Campbell, factor to the Earl of Marchmont, as having full power and commission from the said Earl, not only to preserve the game, both by land and water, but also having full powers to grant commission to such as I shall think proper for the preservation of the same, within his Lordship's territories in this county, Do therefore, by virtue

pursued, was too fatiguing for a man of his years, and of his valetudinary state of health, which, however, was benefited by the moderate use of sport. These licences show with what justice the panel has been represented as a common fowler or poacher. He never sold a bird in his life; the little game he killed, he was in use some times to send in presents to his friends and acquaintance; for the most part he gave it to the first poor person he met with: but, as is already said, he was not much addicted to that exercise. He spent his time in faithfully discharging the duty of his office, in reading, and in company with the gentlemen in the neighbourhood, or of such as came to visit the places in

tue of the above powers, grant full power and commission to Mr. Mungo Campbell, officer of excise at Newmilns, not only to prevent all and sundrie from spoiling the game either by land or water, where his Lordship has right; but also to prosecute such before the sheriff of the county, in his Lordship's name, and on his expence; but also grant the said Mr. Campbell himself, full power, to take what diversions he pleases for himself upon water or land; and this shall be sufficient warrant for so doing.

HUGH CAMPBELL.

These are empowering and authorising you, Mungo Campbell, officer of excise, to hunt upon my muir in Muirkirk, with dog and gun only; and to inform me of any poacher you shall see hunting upon said muir; and this shall be your warrant. Given under my hand, at Loudon, 28th July 1764.

LOUDON.

which

which he resided ; for, however he may be now misrepresented, he was always the man a stranger was directed to spend the evening with, on account of his company and conversation.

The panel's last station, as has been already observed, was at Saltcoats, the easiest perhaps in Scotland. Something more than a year ago he was apprehensive that he would be obliged to exchange stations with one Mr. Scott, by the interest of the collector of the district, who was desirous of placing Mr. Scott a friend of his, who had formerly been a supervisor, in the easy station of Saltcoats. His powerful interest the panel imagined he could not oppose, without making a greater bustle, and employing more solicitation with his numerous friends, than his natural temper inclined him to ; he therefore resolved to give up his office, and take a farm, such as the small sum he had saved could stock, provided one of that extent could be had in, or on the confines of Ayrshire. For this purpose, he wrote to his intimate friend the Rev. Mr. Andrew Ross, sometime minister at Newmills, now at Inch, near Stranraer, acquainting him, that he had saved about 100l. that he was desirous of retiring to the country, and therefore intreating, that he would look out for a small spot, such as his scanty stock would be able to cultivate. This Mr. Ross

would have done, and had the panel got a farm, the unhappy accident that gives rise to this trial would not have happened ; but unluckily, the panel's rival, Mr. Scott died, after which there was no mention made for removing the panel from Saltcoats ; and there he remained till the fatal 24th of October.

The panel is very sensible, that the detail he has given will, at first sight, to some appear trivial and impertinent ; but a very little reflection will convince them it is not so ; for the panel has been egregiously misrepresented as to all the particulars above-mentioned. Never almost against any man were the tongues of clamour and calumny so loud, so abusive, and so false. The reason is indeed obvious, and on account of some circumstances, the panel is ready to forgive them, but he would have been wanting to himself, considering how unjustly he has been traduced, if he had not set forth the true tenor of his life and conversation ; for from that it is evident, he is not the obscure gauger, the disgraced soldier, the common poacher, or the fierce and ferocious ruffian which prejudice has represented him to be. On the contrary, he is, and he always was, a man of a peaceable disposition, of much humanity, and sensibility of temper. The facts he has stated above are true. Those in this country, who will give themselves the trouble to enquire, will

will find them to be so. The panel is above telling what is not truth. To die in any way is a serious matter. To die in the manner with which he is threatened is dreadful ; but the panel is not so much afraid of death, in any shape, as to be willing to purchase life at the expence of a lie deliberately and judicially told. When, therefore, the circumstances in which he stands are considered, the simple annals of his life will be read by the just with attention, by the humane with feeling, nor should grandeur itself peruse them with disdain.

In the course of the above narrative, the panel might have mentioned some occurrences, on which he had occasion to meet the late Lord Eglinton ; but he chose rather to delay them, till he came to speak of the 24th of October, though they have no immediate connection with what happened then. The panel, as already said, though he had licences to hunt on the lands of several noblemen and gentlemen, yet he seldom took the benefit of them. This was particularly the case from the year 1765, before which he lost his health, and was obliged, on sundry occasions, to go to the country to attempt the recovery of it. With this view, he in particular went to Muirkirk in 1764.— Before he went there, he had a licence from Lord Loudon and several neighbouring gentle-

men to hunt upon their grounds, in that part of the country : But these he scarcely ever used ; for at Muirkirk he broke his leg, by which accident he was long confined to the house. This determined him to sell his pointer, and he has never had any dog since.

He came to Saltcoats in 1766. He had no dog when he came, nor has he ever had any since. He indeed kept his gun, and it was necessary for him to do so, as the smugglers in that part of the country, whose detection was his business and duty, always to go armed. With this gun he would sometimes shoot sparrows and other birds, at the desire of the people whose corns they infested, and sometimes (for his amusement) gulls, as he past along the shore. But, with his gun, he gave no offence whatever for two years to Lord Eglinton, who was extremely strict in the preservation of the game on his estate. Nay so anxious was the panel to avoid even all possibility of offending his Lordship, that, when he published an advertisement, prohibiting all persons to fish on the water of Garnock, he complimented a gentleman \* of his Lordship's acquaintance with a very curious and valuable fishing-rod that belonged to him. Thus for two years he gave not the least offence to the late Lord, who, though he was every now-

\* Mr. Leitch of Glasgow.

and

and then holding courts, and fining offenders, never once censured or even suspected the panel. However, in spring last, he did transgress once, and he will fairly tell how that happened.

The panel set out that day in search of smuggled goods, and had along with him Robert Cunningham and William Bolton, shipmasters in Saltcoats, witnesses cited for the prosecutors, and in the course of their walk, shot two gulls.—On their return homewards by the King's high-way which runs near to Park-house, a farm belonging to the late Lord Eglinton, a hare started out of a bush at the side of the highway, on which the panel and his companions were travelling: upon this the panel, partly from surprise, and partly possibly from the instigation of those with him, took aim, and shot her. The report of the gun was heard by Lord Eglinton, who was then at park-house, and he immediately dispatched a servant to inquire about it. The servant (whose name the panel has forgot) came up to the panel, who candidly told the fact as it had happened. That servant went back to his Lordship, and soon after another servant, one Alexander Bartleymore, returned to the panel, and told him, that his Lordship was in a great passion, and that the panel should go and pacify him. Accordingly the panel went up to his Lordship,

ship, who accosted him with many harsh and injurious expressions, accompanied with many oaths. To these the panel answered, that it had never been his intention to hurt his Lordship's sport; told him the fact honestly as it had happened; and asked his Lordship's pardon, assuring him, that he would take care never to offend again; and thus they parted. His Lordship did not at this time demand the panel's gun, nor does the panel believe he ever would have done so, had he not been instigated to use the panel ill by the above-mentioned Bartleymore, for a reason that will by and by be explained; for his Lordship knew who the panel was; knew that he was no poacher: knew that he was a gentlemen, and, as such, had some intercourse with him; particularly once did him the honour to take the use of a dog from him for some time.

What in all probability give rise to the fatal accident, which occasions this trial, was the enmity the above-mentioned Bartleymore conceived against the panel; the rise of which was as follows.

On the 3d of July last, the panel had information, that some smuggled goods were to be landed near Castlecraigs, a noted haunt of the smugglers; upon which the panel, accompanied with John Brown, tide-waiter, and James Macdonald, salt-officer, set out early

early next morning in quest of them. They found the above-mentioned Alexander Bartleymore (a favourite servant of the late Lord) driving a horse and cart towards Park-house, loaded with some casks containing 80 gallons rum; upon which they seized the rum; horse and cart, and carried them to the excise-office at Irvine. But the horse and cart, being supposed to be Lord Eglinton's, Bartleymore was allowed to take back; and they were not brought to condemnation along with the spirits.—From that moment Bartleymore became a declared enemy to the panel. Whether the late Lord heard of this seizure or not, the panel cannot say; far less does he mean to insinuate, that his Lordship had any concern in the adventure; or, though he had, that the seizure of it would have irritated his Lordship against the panel, who did no more than his duty in laying hold of it: but the panel has no doubt, that this seizure made Bartleymore his deadly foe, and prompted him to instigate the late Lord his master to attack the panel, in the manner he did on the 24th of October last; to the account of which unhappy affair the panel must now proceed.

In the forenoon of that day, about ten o'clock, the above-mentioned Mr. Brown tide-waiter, and the panel, set out from Salt-

coats ; their view was principally to examine several places that are the known haunts of smugglers ; at the same time they meant to do this in a way that might afford themselves some amusement ; for which purposes they proposed to walk from Saltcoats to Montfod bank, by a common road that led through Lord Eglinton's grounds, and return by another along the sea-shore ; on which the places noted for smuggling are situated. They had no dog with them, so it neither was nor could be their intention to hunt. Mr. Brown had not so much as a gun. The panel indeed carried his along with him, as he commonly did. He had, as already said, a licence from Dr. Hunter, but he had no occasion for it at this time, as all he proposed was to look for a woodcock in Montfod bank, and the woodcock is not a bird of game ; but as for hunting, he neither meant to take that sport, nor could he do it, as he had no dog.

Mr. Brown, and the panel proceeded accordingly in their course, from Saltcoats to Montfod, which is about three miles distant from Saltcoats. The road they took passes thro' the grounds belonging to Lord Eglinton, Dr. Miller, and Mr. Weir of Kirkhall ; some part of which road is inclosed on both sides, some part of it only on one side, and some part of it is intirely open ; and in this walk they

they met with no body but Alexander Boyes an officer of excise, who accompanied them so far in going round his division, and to him they communicated their proposed rout.

When arrived at Montfod, they searched the wood for a cock, but found none; upon which they went to the extremity of Montfod, which is high ground, in order to get a view of the Horse-Island, under the cover of which smugglers were in use to ly: but perceiving there were none there, they returned by the foot of Montfod-burn, a common haunt of smugglers, and they crossed, by a short cut, a neck of marshy ground not inclosed, near New-house, which to them was known to be a hiding-place for smuggled goods, and thus entered upon the sands leading to Castlecraigs, the most remarkable place of all for smuggling.

After they had thus got into the sands, and had walked along them a considerable way, the above-mentioned Bartleymore thought proper to inform the late Lord Eglington, his master, that the panel had been hunting on his grounds, and this his Lordship it seems believed; for he immediately came out of his coach, in which he was passing on the road from Saltcoats to Largs; and, mounting a horse, he rode, attended by several servants, towards the panel, who was

at that time, and for a considerable time before, 36 yards within the flood mark.

When his Lordship had come near to the panel, he dismouuted, and gave the horse to one of his servants, and then, damning the panel for a scoundrel and a rascal, asked how he came to be hunting upon his grounds, and required him instantly to give up his gun.

To this the panel answered, that he had not been hunting on his Lordship's grounds: nor had he shot any thing that day any where else; nor had he done any thing that deserved his Lordship's displeasure, which he was sorry to see he had incurred; but that if his Lordship should still think that the panel had done any thing wrong, his Lordship might sue him at law, to which he would be answerable: but as for giving up his gun, that he would not do to his Lordship, nor any man upon earth.

All this however did not satisfy his Lordship, who persisted in demanding the gun, and advanced upon the panel in order to take it from him by force; which his Lordship would have easily effectuated, if he had got hold either of it or the panel, as he was the younger and the stronger man.

The panel upon his stepping backwards, repeated his refusal to give up his gun, which  
was

was cocked, and held it by his side in a defensive posture, as an indication of his firm purpose to preserve it; warning his Lordship, at the same time, in the strongest manner, not to attempt to seize it.

Lord Eglinton upon this, perceiving that the panel was resolute, and determined not to part with his gun but with his life, ordered one of his servants to go and fetch his gun, which had been left in the coach, saying at the same time to the panel, he would show him he could shoot as well as he. The servant went off for his Lordship's gun accordingly. This so much alarmed Mr. Brown, the panel's companion, that he instantly retired to a considerable distance.

In the mean time his Lordship continued advancing, and the panel retiring, and resting his gun in the defensive posture in which soldiers are taught to keep their muskets when they retreat. Upon a measurement, it appears that the panel retired 120 yards from the place where Lord Eglinton first assaulted him.

Lord Eglinton's servant, who had been sent for the gun, was by this time within two or three yards of his master, with the gun in his hand. At this moment, the panel, while retreating, stumbled against a stone, and was thrown with violence on his back. As the piece was cocked, while in the panel's hand,

the shock of the fall, or his efforts to recover himself, made it go off, and by its discharge Lord Eglinton, then so near as to be grasping at it, was mortally wounded.

As the piece was cocked in the panel's hand, it is physically impossible, but that the impulse of the fall the panel received, or his efforts to recover himself, must have made it go off. The indictment charges the panel with firing it intentionally. Did the panel know it to be true, that an act of his will occasioned the discharge of the piece, or concurred with the natural impulse of the fall, or his exertion to rise, he would admit it, be the consequence what it would ; but he cannot admit that to be a fact of which he has no consciousness or recollection.

The panel, who was in the utmost confusion, had no time to go up to my Lord to enquire into his situation, and bewail the unhappy accident, which he most certainly would otherwise have done, for he was immediately attacked with the utmost violence and fury by his Lordship's servants : it was natural for them to do so, and the panel does not blame them for it. One of them desperately cut and wounded him in the face, and as the other had the gun, the panel got hold of it, to prevent his using it against him, and endeavoured to wrest it out of his hand,

hand, but that he was not able to do, as others fell upon him.

The servants, after giving the panel a number of cuts and blows, proceeded to tie the panel's hands behind his back with cords, which they pulled so hard that the blood was ready to spring from the tips of his fingers.

Lord Eglinton was then put into the coach, which went home, and one of the servants, on horseback, drove the panel with a cudgel to Saltcoats, threatening instantly to knock him down if he made the smallest attempt to run off. The panel remonstrated much against such mal-treatment, and assured him he would go willingly along, and readily submit himself to justice.

This servant, at Saltcoats, was joined by a number of poor people, dependents upon Lord Eglinton, who vied with one another in insulting the panel. From Saltcoats he was carried to Irvine, before Mr. Hamilton, his hands tied behind his back, his face streaming blood. Mr. Hamilton, who is the provost of that borough, committed him to the prison there, where he met with the most barbarous treatment; was put in irons, and was refused, during his stay in it, even the necessaries of life. From Irvine he was transported to Ayr in a cart, which was the most ignominious method of conveyance that occurred:

curred: and at Ayr he was put in irons. From Ayr he was carried to Glasgow, where the jailor, from compassion, allowed him irons lighter and less galling than those he had been loaded with at Ayr; but for this step a protest, it is said, was taken against that jailor. From Glasgow the panel was brought to Edinburgh, where his irons, unlawfully put on, were taken off; and there he was brought to trial, and hitherto has had, and he hopes all along will have, a fair and a patient hearing.

The indictment charged, 'That whereas  
 ' by the law of God, and the laws of this and  
 ' every other well governed realm, murder,  
 ' or the feloniously bereaving any of his  
 ' Majesty's subjects of their lives, is a most  
 ' atrocious crime, and severely punishable;  
 ' yet true it is, and of verity, That you the  
 ' said *Mungo Campbell*, have presumed to  
 ' commit, and are guilty, actor, or art and  
 ' part, of the said crime: in so far as the de-  
 ' ceased *Alexander Earl of Eglinton* having,  
 ' upon the 24th day of October, in this pre-  
 ' sent year 1769, or upon one or other of the  
 ' days of that month, or of the month of Sep-  
 ' tember preceding, or *November* following,  
 ' gone out from his house of *Eglinton*, in the  
 ' county of *Ayr*, in his coach, to look at  
 ' some of his grounds; and being told by  
 ' one of his servants, when upon the road  
 from

‘ from Saltcoats to Southerman, within the  
‘ parish of Ardrossan and said county of Ayr,  
‘ that he observed two persons, one of them  
‘ with a gun, at a small distance, upon his  
‘ Lordship’s ground of Ardrossan: The said  
‘ deceased Earl (who, by an advertisement in  
‘ the newspapers, had forbid all unqualified  
‘ persons to kill game within his estate) came  
‘ out of his coach unarmed, and mounted a  
‘ horse which was led by his servant, and  
‘ leaving in his coach an unloaded gun, he  
‘ rode towards the two persons, who, in the  
‘ mean time, went off the Earl’s ground of  
‘ Ardrossan into the adjacent sands; and he  
‘ having come near to the two persons on the  
‘ said sands, and discovering the one with the  
‘ gun to be you, the said *Mungo Campbell*,  
‘ he accosted you by saying “ *Mr. Campbell*,  
“ I did not expect to have found you so soon  
“ upon my grounds, after the promise you  
“ made me when I last catched you, when  
“ you had shot a hare:” And the Earl hav-  
‘ ing thereupon desired you to deliver your  
‘ gun to him, you refused so to do: and,  
‘ upon the Earl’s approaching towards you,  
‘ you cocked your gun, and presented or  
‘ pointed it at him: and upon the Earl’s then  
‘ saying, Sir, will you shoot me? you an-  
‘ swered, that you would, if his Lordship  
‘ did not keep off. To which the Earl re-  
‘ plied, That if he had his gun he could  
‘ shoot

shoot pretty well too, or used words to that  
 import ; and desired a servant to bring his  
 gun from his coach, which was then at  
 some distance ; and the Earl having dis-  
 mounted and walked towards you, leading  
 his horse in his hand (without arms or of-  
 fensive weapons of any kind) you retired,  
 or stept backwards, as he approached, and  
 continued to point your gun at him, desir-  
 ing his Lordship again to keep off ; or, by  
 God, you would shoot him : and a servant  
 near to the Earl having begged of you, for  
 God's sake, to deliver your gun, you again  
 refused, saying, you had right to carry a  
 gun : To which Lord Eglinton answered,  
 that you might have a right to carry a gun,  
 but not upon his estate, without his liberty ;  
 but you still persisted in refusing to deliver  
 your gun : and by striking your foot against  
 a small stone, having fallen upon your back  
 when retiring, and keeping your gun  
 pointed at Lord *Eglinton*, as above describ-  
 ed, the muzzle of the gun came thereby to  
 be altered in the direction from Lord Eg-  
 linton, and to be pointed near straight up-  
 wards ; and Lord *Eglinton*, who was only  
 distant from you two or three yards, having  
 stopped, or stood still, upon your falling,  
 you, as soon as you could recover yourself,  
 and, resting upon your arm or elbow,  
 aimed or pointed your gun to the said

Alexander Earl of *Eglinton*, and wickedly  
 and feloniously fired it at him, then standing  
 unarmed, smiling at your accidental fall ;  
 and by the shot he was wounded in the  
 belly in a dreadful manner, the whole lead-  
 shot in the gun having been thrown into his  
 bowels, of which wound the said *Alexander*  
 Earl of *Eglinton* died that night about  
 twelve o'clock. And you, the said *Mungo*  
*Campbell*, after perpetrating so cruel, wicked,  
 and barbarous a crime, did immediately run  
 to one of Lord *Eglinton*'s servants who had  
 brought his gun from his coach, and who  
 was standing at some distance, and endea-  
 voured to wrest the gun from him, but was  
 prevented by the assistance of another ser-  
 vant ; and when the two servants were en-  
 gaged with you, defending the gun, and en-  
 deavouring to secure you, the Earl, who was  
 then sitting on the ground, called to the  
 servants to " Secure the man, for he had  
 shot him ; but not to use him ill ; " or used  
 words to that purpose and effect : and upon  
 your being brought near to Lord *Eglinton*,  
 he said to yourself, " *Campbell*, I would  
 not have shot you."

The court, after this indictment was read,  
 observed, that there might be some doubt of  
 their jurisdiction, as it appeared, from the in-  
 dictment, that the facts charged had happened  
 on the sands ; and the Lord Advocate being

D                   asked

asked whether they had happened within flood-mark, his Lordship admitted that they had; upon which the court having demurred as to their jurisdiction, and expressed a doubt that the trial should have been before the Admiral, the question of the jurisdiction was argued at great length by the counsel on both sides \*; upon which the court ordered minutes of debate to be made up, and adjourned for some days.

Thereafter, of this date †, the court pronounced the following interlocutor, upon the question of jurisdiction.

' The Lord Justice Clerk, and Lord Commissioners of Justiciary, having considered the debate, *viva voce*, at their last sederunt, and foregoing minutes, They find, that the court has jurisdiction to try this indictment, in the first instance, and therefore declare, that they will proceed accordingly.'

Upon this the indictment was again read over to the panel, who pleaded Not guilty; and then counsel were heard at great length for two days, upon the question of the relevancy; after which, the court ordered informations, and, in obedience to that appointment, this one is submitted on the part of the panel, who designs himself *late* excise officer in Saltcoats,

\* Dec. 18. 1769.

† Dec. 22. 1769.

because

because he has been turned out of his office unheard and untried.

In stating the defence of the panel, it is necessary, in the first place, to analyse this indictment, and call the attention of the court to a variety of facts therein acknowledged, or to speak plainly, to the different injuries it admits the panel received from the deceased Lord.

And 1st, it will be observed, that the indictment admits several *verbal* injuries to have been received by the panel from the deceased; it indeed does not set forth the injurious appellations of scoundrel and rascal, or the abusive curses and oaths, with which, as already said, the panel was loaded: but yet it admits verbal injuries to have been given by the deceased; for it sets forth, that the deceased charged the panel with hunting on his grounds, and hunting in breach of promise; as also, that the deceased demanded the panel's gun, which, it is notorious, is always understood to be a demand the most injurious and affronting.

2dly, The indictment admits, that from *verbal* injuries, Lord Eglinton proceeded to *real*, by advancing upon the panel, and endeavouring to take his gun by force; that is, transfer the property of it to himself from the panel violently.

3dly, The indictment admits, that the deceased threatened to shoot the panel, and sent one of his servants to fetch his gun, which was hard by, for that purpose. His Lordship's expression, 'that if he had a gun he could shoot pretty well too,' which the indictment admits, plainly imports so much, and the sending for the gun can bear no other construction, and leaves no room to doubt; and accordingly, that such was his Lordship's intention the remaining servant understood, and was therefore alarmed for the panel, and called out to him, as the indictment sets forth, 'for God's sake to deliver up his gun.'

4thly, The deceased persisted in advancing upon and assaulting the panel, who retired as his Lordship came on.

5thly, The panel, while retiring, was thrown down upon his back; and it was then, and not till then, according to the indictment itself, that he fired the piece.

The next thing to be considered is the conduct of the panel on this occasion.

It will be observed, 1st, That it is admitted in the indictment, that if the panel did fire this piece, he did it not till after he had given the deceased fair warning of his danger, both by words and actions.

2dly, That the panel retired from before his Lordship for a considerable time and space.

3dly,

3dly, That if the panel did fire his piece, he did not do so till he could retire no more, till he was disconcerted, agitated, and provoked by a fall, occasioned by the unjustifiable assault of the deceased.

4thly, That the panel had no other weapon to defend him but his fowling-peice.

So standing the fact, even according to the shewing of the indictment itself, the question comes to be, Whether the homicide that is charged was murder, or culpable homicide, *i. e.* Manslaughter, or homicide in self-defence.

This is a great and important argument in every view. It is of the utmost consequence to the parties, to this court, and to this country. It is of importance to the noble prosecutor, to avenge his brother's blood: it is of still more importance to the panel, to avoid an ignominious death. But it is of greatest importance of all to this court, and to this country: for, from the high rank of the deceased, and other circumstances, this is a trial of much expectation. The eyes of this nation, of our neighbouring nation, and perhaps the eyes of many in foreign nations, are fixed on those who are to decide it. Besides, it is obvious, that the great rights of mankind are the object of judicial disquisition: so that in after times, future lawyers, and future judges, will resort to the record of this

trial for instruction and example. Hence all the considerations that can touch men of honour conspire to make those, whose duty it is to form an opinion upon this case, not only to give the closest attention, but to examine themselves thoroughly, and search their hearts to the very bottom, to prevent from lurking there certain prejudices, to some of which, as men, and to others of which, as good men, they must be liable. The panel means, that they should take special care to banish from their bosoms all prejudices, arising from respect to the high rank of the deceased, regard for his personal worth; and remembrance of his friendship past.

The first point to be discussed in this argument is, Whether Lord Eglinton had a right to take the panel's gun from him by force.

The counsel for the prosecutor, in their pleading, and in the information they lately exhibited, have not pretended that Lord Eglinton had any such right by the common law; they endeavoured to support it by a passage of one of the game-laws\*.

But the panel is hopeful he will be able to show, beyond all possibility of contradiction, that, by that statute, game-law as it is, Lord

\* Act 1707. C. 13.

Eglinton had no right to take the panel's gun from him by force.

The wisdom and propriety of these game-laws has been all along doubted by the more sober and sensible part of this nation. They are most certainly a restraint upon the natural liberties of mankind, and run counter to one of their original passions; for the passion of hunting is natural and original, as much as any other appetite; and the reason of implanting it evidently was, that it was intended men, in their natural state, should subsist by hunting and fishing: and in fact, in the uncivilized part of the globe, which is by far the greatest, men do subsist in that way to this day, though the artificial life, which the perfection of society has introduced among us, makes us seek subsistence in a very different manner: but still the passion breaks out; and there are few, if any, who have not, at some period of their life felt its force.

Though this passion is undoubtedly natural and original, and consequently though a very cursory reflection must have shown that it was not to be eradicated totally, however, like other natural passions, it might have been moderated and restrained; yet the total suppression of it is the hard task which the game laws of this country have rashly undertaken, and that with very little temper or management; on the contrary, with so much heat and

and severity, that no disinterested person can read them without feeling his blood rise with indignation at Scottish aristocracy, with whose haughty pen they have been evidently drawn.

As these game laws stand, were they to be strictly put in execution, few gentlemen in this country would be entitled to shoot upon their own ground; for one of these laws\* prohibits all persons whatever from shooting, except noblemen and gentlemen, or the domestics of noblemen and gentlemen, who have L. 1000 of valued rent, which few gentlemen in this country possess: the consequence of which law, if carried into execution, would be, that the proprietor of a small farm, or even a gentleman of opulent estate in some parts of the country, must lay by his arms, and deny himself the sport of hunting, however pleasing, while, at the same time, he must behold with tameness and submission his fields traversed and trampled by the footmen of a lord.

Such being the nature of game laws, and as they are clearly encroachments upon the common law, and restraints upon the natural rights of mankind, it is indisputable that they ought to be most strictly interpreted. The act 1707, is the only game-law upon which

\* Act 1685, C. 20.

Lord

Lord Eglinton's attempt to take by force the panel's gun, can with any colour be justified ; for the reason just now assigned, it ought to be most strictly interpreted ; but there is no necessity for resorting to a strict interpretation, as it is obvious from the scope of the act, and every clause and expression in it, that it does not authorize a summary seizure, but only a forfeiture by legal process.

This statute is in these words ; ' Our sovereign Lady, with advice and consent of parliament, does hereby strictly prohibit and discharge, in all time coming, the killing of muir-fowls from the first of March till the 20th of June ; and partridges from the first of March to the 20th of August, inclusive, under the penalty of 20 l. Scots *toties quoties*, the half whereof to be given to the discoverer, and the other half to be at the disposal of the judge *before whom the same shall be cognosced*. And, for the better preventing the killing of these fowls, during the foresaid prohibited seasons, her Majesty, with advice foresaid, does strictly prohibit and discharge the selling, buying, or using of these fowls during the foresaid seasons, within any burgh, village, or private house within this kingdom, *under the penalty aforesaid, to be applied as above*. As also, it is hereby discharged, that no *common fowler* shall presume to hunt on any grounds with-

out a subscribed warrant from the proprietors of the said grounds, under the penalty foresaid, besides forfeiting their guns, dogs, and nets, to the apprehenders or discoverers. And it is hereby further provided, that no fowler, or any other person whatsoever, shall come within any heritor's grounds, without leave asked and given him by the heritor, with setting dogs, and nets for killing fowls by nets; and if any common fowler shall be found in any place with guns or nets, having no licence from any nobleman or heritor, they shall be sent abroad as recruits. As also, that no persons whatsoever shall shoot hares under the fore-said penalty. And, for the better executing of this law, her Majesty, with advice foresaid, appoints and ordains all sheriffs of shires, stewarts of stewartries, justices of peace, masters of the game, bailies of burghs or regalities, to put the same in due execution, under the penalty of 100 l. Scots; for which penalty, it is hereby declared, that the said judges shall be liable to the pursuer or complainant before the Lords of Session, upon an instrument taken by the said pursuer or complainant, that the judge applied to refused or delayed to cognosce the complaint according to law, and to *decern in the terms of this act.*

It will be observed, that the first clause of this statute expressly enacts, that the offence which it creates should be tried before a judge, and punished by a fine; and that all the subsequent clauses refer to the same method of procedure. Thus the second clause prohibits buying, selling, or using muir-fowl during a certain period, ‘under the penalty *foresaid*, to be applied *as above*:’ And the third clause, which is the one in question, discharges common fowlers to hunt, without a warrant, on any gentleman’s grounds, ‘under the *penalty foresaid*, besides forfeiting his dogs, guns, and nets to the apprehenders or discoverers;’ from which it is plain, that the pecuniary penalty, and the forfeiture of the dogs, guns, and nets, are to be obtained in the same way; and as the act does not give (and it is impossible to believe that it meant to give) the apprehender a power of taking the penalty of 20l. Scots out of the pocket of the person apprehended; so neither did it mean to give a power to the apprehender, of forcibly taking from the person apprehended his dogs, guns, and nets: besides, it will be observed, that this clause puts the apprehenders and discoverers upon the same footing. And as it is clear, a discoverer, who has no hold of the person that has been shooting, cannot possibly make effectual, either the penalty, or the forfeiture of the dogs, guns, and

nets, otherways than by process at law: so neither can the apprehender, who is put upon the same footing, and has not a more summary remedy given him. Moreover, the last clause of the act plainly supposes, that it was to be enforced only by judicial procedure, for it recommends the execution of the act to inferior judges, and inflicts penalties upon such as shall refuse or delay to cognosce the causes brought before them in consequence of it, or to decern in terms of it, which evidently supposes that its different enactments were to be carried into execution by the decrees of judges, not the force of private persons.

And the most absurd and dangerous consequences must ensue, were the interpretation in favour of a summary forfeiture to be listened to. It is adverse to the first principles of law, to vest the cognisance of any offence in the person who is intitled to the penalty imposed upon it; and it would have been peculiarly absurd in this act to have done so, as it gives the penalty, *cuivis e populo*, to the greatest vagabond or scoundrel in the country, as well as to the first person in it. Had the remedy been given to the proprietors of land, the presumption might be, that they were persons of character, and there might have been some reason for trusting them with an extraordinary power; but, as the remedy in this statute

tute is given to *every* apprehender, and consequently may be used by the most abandoned and profligate wretches, it is impossible to believe, that the wisdom of the nation could ever mean to make them judges, and allow them to forfeit the dogs, guns, and nets of whatever person they thought proper.

It does not follow, from a man's being found shooting on the ground of another, that he is liable in the penalties and forfeitures above-mentioned. It has been always held to be game-law by the adepts in that science, and it was so held by the late Lord Eglinton, as appears from several of his advertisements in the news-papers, that 1000 l. of valued rent entitles a man to shoot not only upon his own grounds, but upon those of every other person. If therefore a man is found shooting on another's grounds, it does not follow, that he is liable in penalties. If he has 1000 l. Scots of valued rent, or be the domestic of a person who has 1000 l. of valued rent, he is not challengeable: he must want all these qualifications, and be a common fowler, before he can be subjected in the penalties. Now how can the many different questions, that may arise as to his valuation or station, be determined otherwise than before a judge? Is every vagabond and villain in Scotland to be entitled, at his own hand, to apprehend the dogs, guns, and nets of every

man

man he meets, perhaps the first gentleman or nobleman in the country? The absurdity of such an interpretation is gross and glaring, nor can it be supposed, that such was the meaning of the act, without supposing, that those who drew it were out of their senses, or that it was their intention to set the subjects of this country by the ears, and incite them to batteries and bloodshed.

It has been said for the prosecutors, that the law would have been defective, unless it had allowed a summary seizure; because common fowlers and poachers are commonly vagrants, who, if once allowed to escape, cannot be easily afterwards found out, and brought to justice.

But the law is abundantly severe, by allowing a forfeiture of the dogs, guns, and nets, even by process, and by adjudging those, called common fowlers, to be sent abroad as recruits, if found hunting without licence: nor was there any great danger of their making their escape; for the gentlemen, enamoured of the game, are both able and willing enough to seek them out, if they are in the country. But, though the consequence of not allowing a summary forfeiture were to be, that these fowlers should always escape, that would have no weight in the argument. The question is what the law has said and enacted, not what it might have enacted in order to attain

the end it had in view: but from what has been said, there can be no doubt, that those who framed the law in question, would rather have chose that every common fowler should escape, than that the power of forfeiting summarily should be conferred on *every apprehender*.

The learned gentleman who draws the information for the prosecutors, aware of the absurdities into which the interpretation he must maintain runs, represents, that the view or purport of the act, was to authorize a summary seizure of the dogs, guns, and nets, 'in order to lay the foundation for an after-conviction in a court of justice,' in the same way that the officers of the revenue are permitted to make seizures of goods, the legality of which seizures may be afterwards tried at law. But there is not the least foundation in the statute for this hypothesis. It does not authorize any seizure, which word is not to be found in it from beginning to end. If it allows the apprehender to do any thing at his own hand at all, it allows him to forfeit, and consequently he is under no necessity to bring a process in order to justify his detention of the dogs, guns, and nets. Indeed the using the word forfeiture of itself demonstrates, that the act meant that legal process should be necessary; for a forfeiture can only be inflicted by the sentence of a court. Besides,

sides, the allowing a seizure *brevi manu*, would be just as bad as allowing a forfeiture; for, as every person might seize, the dogs, guns, and nets of the best people might be taken from them by the most rascally vagrants, whose vagabond life would secure them from detection and punishment: nor does any analogy hold from the seizures allowed by the revenue law, as these seizures are not permitted to *every* apprehender, but can only be made by public officers, who find security to be answerable, and who have an express authority by the words of the statutes to seize.

The panel has only further to add, that even though it should be supposed that a summary forfeiture was allowed by the statute, yet he was not comprehended under it, for it only reaches to common fowlers, that is to say, persons who make a trade of killing and felling game, but that the panel never did; he, as has been already set forth, never sold a bird in his life, and, instead of being looked upon as a common fowler, he, on the contrary, had licences to shoot for his amusement from most of the noblemen and gentlemen in the neighbourhood, and was authorized by them to preserve the game on their estates, and prosecute poachers; all which Lord Eglinton very well knew.

From

From what has been above submitted, it is hoped it will appear, that both the words and spirit of the law, and every consideration of reason and expediency, conclude strongly against the interpretation contended for by the prosecutor; and this the panel takes the liberty to assert with the greater confidence, that a judgment in point was pronounced a good many years ago, by the Court of Session, in the case Gregory against Wemyfs, which was determined 23d January, 1753, and is thus observed in the Faculty Collection for that year: ' As Mr. Gregory, attended by one Baird, was beating about for game on the lands of Leuchars, Mr. Wemyfs, a neighbouring heritor, came up and seized the fowling-piece which Baird carried. Gregory insisted, before the sheriff-depute for the county of Fife, that the fowling-piece, as being his property, should be restored to him. The sheriff found, that it was unwarrantable in Wemyfs to seize the gun libelled and therefore found him liable in restitution of it, in as good case as when he took it.

' Wemyfs advocated the cause, and pleaded that Baird was a common fowler, and had no licence to shoot from the proprietor of the lands of Leuchars; and therefore that he was within the 13th act of parliament, i. of Q. Anne, which provides, That no

common fowler shall presume to hunt on  
 any grounds without a subscribed warrant  
 from the proprietors of the said grounds,  
 under the penalty of 20 l. Scots, besides  
 forfeiting their dogs, guns, and nets, to  
 the apprehenders or discoverers. That if  
 the forfeiture of the dogs, guns, and nets,  
 mentioned in the statute, had been given  
 only to the discoverer or other prosecutor,  
 who should sue for them in the courts of  
 law, the purpose of the legislature to pre-  
 serve the game would have been ineffectual;  
 for that if common fowlers (who are gene-  
 rally vagrants, their persons little known,  
 and the places of their abode uncertain)  
 should once escape, it would be difficult to  
 bring them to justice; therefore it is that  
 the legislature, introducing another remedy  
 at once more summary and more effectual,  
 has permitted their dogs, guns, and nets  
 to be *brevi manu* apprehended, and there-  
 by forfeited to the apprehenders; agreeable  
 to which interpretation of the statute, the  
 universal practice has been; and no action  
 of damages has ever been brought by any  
 common fowler, whose dogs, guns, or  
 nets have been so forfeited. From all  
 which Wemyss subsumed, that he had  
 the authority of law for what he had  
 done,

• Pleased for Gregory, the words of the  
 • statute, apprehenders, or discoverers are  
 • evidently synonymous terms, and relate to  
 • a legal prosecution. Were a summary,  
 • apprehension, and forfeiture admitted, the  
 • cognizance of the offence would be vested  
 • in the person, to whom the benefit arising  
 • from the penalty would accrue; a regula-  
 • lation so contrary to the genius of law in  
 • general, cannot be introduced otherways  
 • than by express statute.

• The Lords repelled the reasons of advo-  
 • cation, and remitted the cause,' that is,  
 • they affirmed the decree of the sheriff.'

This is a judgment directly in point; for as to the exception taken against it in the information for the prosecutors, that the gun did not belong to Baird, but to Mr. Gregory, and that it does not appear from the decision but that Mr. Gregory was qualified to kill game, it is perfectly frivolous. There can be no doubt the act meant the guns should be forfeited, whether they belonged to the common fowlers that use them, or not. But supposing it were otherways, as Mr. Gregory was hunting along with Baird, his gun was liable to be forfeited, although it had been in his own hand. And as to the observation, that it does not appear from the decision, that Mr. Gregory was not entitled to kill game; it appears from Mr.

Gregory's designation, that he was professor of mathematics at St. Andrews; but he does not pretend that he had an inch of ground, much less that he had so great an estate as qualifies its proprietor for killing game on the lands of another. Had he been so qualified, it is impossible to believe, but that his counsel would have set forth a circumstance so material and decisive.

From what has been above argued, it is, with submission, evident, that though the panel had been a common fowler, and hunting upon the 24th of October on Lord Eglinton's ground, his Lordship had not, in virtue of the statute, any title to take his gun from him by force. But the injustice of his Lordship's demand is, if possible, made clearer by this circumstance, which is not contraverted; viz. That the panel had not been hunting on his Lordship's ground. No such thing is charged in the indictment, nor has any such thing been alledged by the counsel for the prosecutor, in their pleadings, or in the information. All the indictment alledges is, that a servant told Lord Eglinton, that he saw two persons, one of them with a gun, at a small distance, upon his Lordship's grounds at Ardrossan. But it does not say, that the panel had been actually hunting there that day. Now where is the law that says, a man must not pass with a gun on his shoulder

shoulder along the highway, that runs thro' the grounds of another, or through any grounds?

From what has been above stated, the panel flatters himself, he has made out to the satisfaction and conviction of every reader, that in point of law, Lord Eglinton had no right to take his gun. What the consequences of that position must be, will appear by and by.

The panel's defences (though branched out into a variety of topics in the information for the prosecutors) come all under two heads, in so far as applicable to the relevancy of the indictment as laid, which the defence of mere accident is not; and they were so arranged at the pleading, and fall to be so in this information. He is to maintain, in the first place, that, supposing him to have committed intentionally a homicide upon Lord Eglinton, that, in the worst view of the case for the panel, should only be reckoned culpable homicide, the punishment of which is arbitrary, not murder; because it appears, from the showing of the indictment itself, it was not committed from premeditated malice, no such thing being charged, but upon a sudden quarrel, of which the panel was not the beginner or author, in the heat of blood and of passion, and upon great provocation by injuries both verbal and real, actually done him.

But,

But, 2dly, The panel is to maintain, That the homicide, as charged, was justifiable, or at least excusable, being committed in lawful defence of property, honour, and life, and to prevent the loss of them all.

1st, Then, in the worst view of the case for the panel, the homicide was but culpable, and only arbitrarily, if at all, punishable, because of the provocation he had received. This is a question of very great moment; and for the solution of it we must resort to first principles and the constitution of human nature.

All animals resent an injury or attack upon them. This they do not in consequence of reflection, or any act of the understanding, but involuntarily and mechanically, by an impulse from nature, wisely implanted in them for the preservation of the several species. The emotions of anger and resentment are sudden, involuntary, and mechanical, as is evident from the effect they produce upon the nerves, limbs, and features of all animals, who are affected with them. Matter is not more subject to the laws of gravitation, elasticity, and the like, than the spirits of man, and of all animals, are subject to the impulse of anger and resentment. \* These, indeed, are laws of nature in the proper sense,

L. 1. § 3. ff. *De justitia et jure.*

being

being *quod natura omnia animalis docuit*; and therefore every animal, when attacked, resorts to those instruments of defence with which nature has supplied it.

† *Imperat hoc natura potens*—  
*Dente lupus, cornu taurus petit unde, nisi intus*  
*Monstratum*—

Mankind, as well as the inferior animals, are liable to the involuntary and mechanical emotions of resentment. Every man who injures another feels this. He knows and feels, that in every person whom he attacks, he must excite these mechanical and involuntary emotions; and therefore, if he is hurt, or slain by the person attacked, he has himself only to blame, and is not improperly said by lawyers to have killed himself. \* *Interfectus ab invaso, se defendantem, videtur magis a seipso occisus, quam ab insultato.*

As these emotions are mechanical and involuntary, and therefore cannot be prevented, it would be absurd and unjust in any legislature to punish a man for being subject to them, or acting in the way and manner their impulse directs: a legislature so punishing would fly in the face of nature, and arraign its Author. Accordingly no legislature under the

† Hor. lib. 2. Sat. 1. & 51. n. 28. \* Carp. p. 1. Q. 29.

heavens ever thought of inflicting such punishment; but the lawyers of all countries have in one voice agreed, that a distinction should be made between slaughter committed from premeditation, and slaughter committed on a sudden quarrel and provocation. The first they have most justly punished with death: the last they either excuse altogether, or give it the check of an arbitrary punishment; not so much from a principle of justice, as from the wise purpose of inspiring an aversion and abhorrence of bloodshed.—Hence most of them have not directly acquitted the slayer, but rather opened a way for him to effectuate his safety, by giving him the privilege of sanctuary, or some other such indirect method of relief. And for the same reason, though those who slay men in their own defence, are indisputably justifiable; yet the laws of many ancient nations obliged them to undergo certain ceremonies and purifications: and upon the same principle, in some countries, brute animals, and even inanimate substances that have occasioned the death of a man, are forfeited and applied to pious uses, as is the case of *Deodands* in England.

However, the law of all nations upon this question resolves into a distinction between slaughter committed from design and premeditation, and slaughter committed from a sudden

a sudden quarrel and provocation. The first is most justly punished with death; because it does not proceed from a mechanical or involuntary impulse or emotion, but a deliberate act of the will and understanding, and therefore manifests a depravity of heart, a temper inconsistent with the rights and interests of society. But the last species of homicide is either altogether excused, or only arbitrarily punished; because it does proceed from a mechanical or involuntary impulse or emotion; consequently it cannot be ascribed to any bad motive; and it is the motive alone that makes an action criminal or virtuous, the object of reward or punishment, and consequently of law. *Voluntas non exitus spectanda est*; that is to say, an action unaccompanied with a motive is nothing more than the operation of a piece of matter. And hence it is, that inanimate substances, brute creatures, and even human, who have not attained to reason by non-age, or have been deprived of it by disease, are not to be called to account for the slaughter of a man, which they may occasion, but cannot commit.

It is however, no doubt, most just and reasonable, and is established by the laws of this and every other country, that in order to constitute murder, a long antecedent design or premeditation is not requisite. It is sufficient, in order to found a capital punish-

## Government,

ment, that a design or premeditation appear; and wherever an interval of time has elapsed between the provocation given and the slaughter ensuing, sufficient to have given the person offended an opportunity to cool and reflect, the slaughter will then be murder: for if any considerable space of time has intervened, the slaughter did not proceed from any mechanical, involuntary impulse or emotion, but from a deliberate act of the will and understanding.

But if a sufficient time for cooling did not intervene, the slaughter will not be murder, and ought not to be so. It is evidently accidental or *casual*; for the meeting of the parties was casual; their quarrel was casual; and even the blow or wound that occasioned the death was casual; because it did not proceed from deliberation, but an involuntary mechanical impulse.

The principles above explained are obviously solid and sound; they are principles which temper justice with mercy, and therefore they have been adopted into the law of every nation under the sun.

The law dictated to the Jews by the highest authority is clear and explicit upon this distinction: it could not indeed be otherwise, as it came from the Author of nature, who, it would be impious to suppose, would frame laws on any other plan, would frame laws which

which must have proved snares to mankind, by reason of the frailties which he has thought proper to give them. Such a supposition runs counter both to the words and spirit of the whole sacred writings, which all along declare that he does not lay righteousness to the line, or judgment to the plummet; that he will always remember men *are flesh*. And accordingly, after considering the system of the judicial law of Moses, it will appear, that these gracious principles run through every part of it, and shine no where more conspicuous than on the subject of homicide.

The general rule laid down is, ‘Thou shalt not kill:’ but then this general rule is explained, and limited by a variety of exceptions and restrictions, that bring the doctrine of the Jewish law precisely to the distinction above-mentioned. That distinction is thus laid down in general \*: ‘If a man lie not in wait, but God deliver him into his hand, then I will appoint thee a place whither he shall flee. But if a man come presumptuously upon his neighbour to slay him *with guile*, thou shalt take him from mine altar that he may die.’ By this text it is evident, that he only who had committed a slaughter deliberately, or with guile, was to be taken from the altar that he might die:

\* Exod: xxi. 13, 14.

but the man who had not slain his neighbour from premeditation, but had casually slain him on a sudden, was to have protection in a city of refuge.

This is put out of all doubt by two other passages of the Pentateuch, which are explained and illustrated with much learning and good sense in the celebrated information for Mr. Carnegie of Finhaven \*. These passages shall be transcribed, and then the substance of the above-mentioned exposition given.

The first of these is as follows ; ‘ And this is the case of the slayer which shall flee thither, that he may live. Who so killeth his neighbour *ignorantly* whom he *hated not* in time past ; as when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe, to cut down the tree, and the head flippeth from the helve, and lighteth upon his neighbour that he die, he shall flee unto one of those cities and live. Lest the avenger of the blood pursue the slayer while his heart is hot and overtake him, because the way is long, and slay him ; whereas he was not worthy of death, inasmuch as he hated him not in time past.’

\* See Finhaven’s trial from p. 42. to p. 82. inclusive.  
Deut. xix. 4, 5, 6.

The other, after ordering cities of refuge to be appointed, proceeds thus\*: ' These six cities shall be a refuge both for the children of Israel, and for the stranger, and for the sojourner among them, that every one that killeth any person *unawares* may flee thither. And, if he smite him with an instrument of iron (so that he die) he is a murderer. The murderer shall surely be put to death. Or, if he smite him with an hand-weapon of wood (wherewith he may die) and he die, he is a murderer. The murderer shall surely be put to death. The revenger of blood himself shall slay the murderer. When he meeteth him he shall slay him. *But*, if he thrust him of hatred, or hurl at him by lying of wait, that he die; or in enmity smite him with his hand that he die, he that smote him shall surely be put to death, for he is a murderer. The revenger of blood shall slay the murderer when he meeteth him. *But*, if he *thrust him suddenly without enmity*, or have cast upon him any thing without lying of wait, or with any stone wherewith a man may die, seeing him not, and cast it upon him, that he die, and was not his enemy, neither sought his harm; then the congregation shall deliver the slayer out of the

\* Numb. xxxv. from verse 15. to verse 28. inclusive.

hand of the revenger of blood, and the con-  
 gregation shall restore him to the city of his  
 refuge, whither he was fled ; and he shall  
 abide in it unto the death of the high priest,  
 which was anointed with the holy oil. But,  
 if the slayer shall at any time come without  
 the border of the city of his refuge, whi-  
 ther he was fled, and the revenger of blood  
 find him without the borders of the city of  
 his refuge, and the revenger of blood *kill*  
*the slayer, he shall not be guilty of blood* ;  
 because he should have remained in the city  
 of his refuge until the death of the high  
 priest ; but, after the death of the high  
 priest, the slayer shall return into the land  
 of his possession.

It will be observed, that, in the first verse  
 of the first passage, that the word *ignorantly* is  
 explained by the subsequent expression, *whom  
 he hated not in time past* ; from which it is evi-  
 dent, that the word *ignorantly* does not im-  
 port, that the slayer knew not that he killed  
 his neighbour, but that he killed him without  
 a foreknowledge, a foresight, a former rati-  
 ocination and design ; for it is obvious, that,  
 if a man killed his neighbour ignorantly, *i. e.*  
 not knowing that he killed him, it would  
 not be murder, even though he had hated  
 him before ; because it would be palpably un-  
 just to conjoin even a previous enmity with a  
 killing purely and perfectly accidental, in or-  
 der

der to make it amount to murder. The matter is fully explained in verse 11, which text does not say, that, if a man smite his neighbour whom he knew, although without hatred, and without lying in wait, and without rising up against him, that he shall surely die; by no means: on the contrary, it puts the issue of his dying or not upon his hating, rising up against, or lying in wait for him that he did kill, that is, upon his designing to take his opportunity from premeditated malice.

Nor is it any objection, that the examples given in verse 5th are of slaughter perfectly and strictly casual. These examples do not exhaust the rule, as is fully proved by verse 11, for it does not extend the capital punishment to all who came not under the description in verse 5th, but extends it to those only who *hated their neighbour, lay in wait for him, and rose up against him.* The above is indisputably the sound interpretation of the first passage, though the matter is still more fully explained in the other passage from the book of Numbers, where the general rule laid down is, that every one may fly to the cities of refuge, that kills any person *unawares.* Now nothing can be plainer, than that killing unawares, means killing without deliberation, without forethought, *ex improviso, ex inconsulto.*

After

After laying down the above general rule, the text proceeds to an inlargement or amplification of it. ‘And if he smite him with an instrument of iron, &c.’—These are the amplifications; the limitations follow in verse 20. ‘*But if he thrust him of hatred*,’ &c. Here is the limitation (introduced with the particle *but*) he that killeth or thrusteth with an iron weapon is a murderer, qualified with the restriction, but if he thrust him of hatred; that is, in other words, he is a murderer if he thrust him with hatred: and this is still more clearly set forth in v. 22, *et seq.* where thrusting suddenly is set in opposition to thrusting with enmity, with a direct reference to the 16, 17, and 18th verses. In verse 22, *et seq.* all the three methods of killing, mentioned in verses 16, 17, and 18, are referred to. Thrusting (properly applicable to the killing with a sword) casting any thing upon him, without lying in wait, or forethought, or with any stone, *wherewith a man may die*, the very case put in verse 17, and there deemed to be murder; yet, in this verse 23, it is declared not to be murder, and, that the slayer shall be delivered from the avenger of blood, if he was not his enemy, neither sought his harm; so that it is clear as sunshine, the three last verses contain a limitation of all that went before. By verses 16 and 17, the instrument, of whatever nature, was to raise a presumption

tion, if a mortal one: but, by verses 22 and 23, if it should appear, that the person slain was not thrust, hurled at, or smitten *in enmity*, &c. the slayer was not to be found guilty of murder, but to be delivered from the avenger of blood.

Nor can any objections be drawn from the words, *seeing him not*, which occur in verse 22, as if it was requisite for the slayer's safety, that he did not see him that was thrust at or killed with a stone, though not done in enmity. For, *first*, It will be observed, that the word *him* is not in the original, but has been added by the translators, and is accordingly distinguished as such with Italic letters in all correct editions of the Bible. This addition of the word *him* is evidently erroneous: the expression should have been *seeing not*; nor should the translators have made use of our participle *seeing*, but, according to the idiom of the Latin language, of an adjective, such as *improvidus*, *imprudens*, or the like: and accordingly the Septuagint uses a Greek adjective of that signification. But, *2dly*, The words *seeing him not*, however they may refer to the case of throwing a stone, yet they can not possibly refer to the words *thrusting without enmity*: for how can a man, in any proper sense, be said to thrust at another whom he feeth not? In short, the sense comes clearly out to be, that when a thrust or blow was given without enmity, forethought, or premeditation, the

slayer was not to be found guilty of murder, but to have the benefit of the city of refuge; and so all the Jewish lawyers and doctors have uniformly held.

The above learned, judicious, and convincing explanations are taken from the information for Carnegie of Finhaven; and any person who will attentively consider them with the Bible before him, will easily perceive the fallacy of the arguments offered in the information for the prosecutors in this case, which are the same with those urged in the information for Mr. Carnegie's prosecutors, to prove that only homicide, strictly casual, was exempted from capital punishment by the law of Moses.

The panel shall conclude on this head with submitting an additional observation or two in confirmation of the doctrine on this point maintained for Finhaven: The first is, that it is not to be supposed, that the law delivered to Moses would have been at so much pains to explain and declare in so many different passages, by a variety of illustrations and examples, that homicide, altogether accidental or casual, was not punishable with death, for that is a proposition perfectly clear and indisputable. It is only homicide arising from provocation that gives rise to questions of any difficulty. 2dly, The panel would observe, that it is proved clearly by the close of the

passage

passage above quoted from the book of Numbers, that provocation was sufficient to justify, at least excuse homicide. It is expressly laid down in verse 27th, That if the revenger of blood, shall find the slayer without the borders of the city of refuge, and kill him, he shall not be guilty of blood, which evinces, that the occasioning the death of his kinsman, though by accident, was provocation sufficient to justify or excuse the revenger of blood for putting the slayer to death, not only immediately after the slaughter, while his *heart was hot* (as expressed in verse 6th of the first passage), but *ex intervallo*, and at a very great distance of time. The panel is at a loss to comprehend how the prosecutors will reconcile this with their doctrine, that no homicide, except that strictly casual, was exempted from capital punishment by the law of Moses. *Lastly*, The panel would observe, that the latest and most judicious divines, who have written upon the law of Moses, agree in thinking its doctrine stands as the panel has represented. The panel shall only transcribe a passage from the late excellent book, intitled, “ A critical and practical exposition of the Pentateuch.” “ But if he thrust him suddenly without enmity, &c. But if, on the contrary, the mischief appears to have been done in a sudden fit of

\* Printed in folio, 1748.

‘ passion or provocation unpremeditated; without any foregoing threat, grudges, or malicious intention, then the Court, before whom the case is tried, is to pronounce it mere manslaughter, and acquit the slayer from all private revenge from the friends and relations of the person so slain.’ See Pyle †.

As to the civil law, it likewise adopts the same distinction. ‘ Quamvis ferro percussa rit, tamen non occidendi animo, leniendam pœnam ejus qui in rixa casu, magis quam voluntate homicidium commisit.’ It is evident, that the *animus occidendi* here meant, is a premeditated *animus* or intention, and not that the law is talking of a blow or wound given by pure accident; for such a position is excluded by the *species facti*, which is the subject of consideration, according to which the parties were in a quarrel or *rixa*. And to the same purpose, a text in the Code \*, Si pro- baverit, non occidendi animo hominem a se percussum esse, remissa homicidii pœna se- cundum disciplinam militarem sententiam procuret, crimen enim contrahitur, si et voluntas nocendi intercedit, cæterum eo qui ex *improviso casu*, potius quam *fraude*, acci- dunt, fato plerumque, non *noxæ* imputan- tur.—The *voluntas nocendi* here meant is a premeditated *voluntas*, which is evident from the expression *casu potius quam fraude*.

† L. 1. Par. 3. ff. ad leg. Car. de sic. \* L. 1. Cod. ibid.

And

And that according to the notions of the Roman lawyers, provocation, justified and excused, appears from the following decision, in a question as to the *actio noxalis*, which lay for damage done by a brute animal *contra naturam sui generis*. ‘Cum arietes, vel boves commisissent, et alter alterum occidit, Quintus Multius distinxit, ut si quidem is perifset qui *agressus erat*, cessaret actio; si is qui non PROVOCÄVERAT, competenteret actio.’ Which determination is founded upon the great principle above explained, that the impulses of resentment and self-defence are implanted in all animals, and that their emotions are involuntary and mechanical.

As to the commentators and doctors of the civil law, they all adopt the distinction betwixt slaughter committed from premeditated malice, and slaughter on a sudden provocation, they hold that an attack and provocation make a man to be not in *plenitudine intellectus*. This is expressly laid down by Carpzovius in these words \*: ‘Sane difficillimum justum dolor et iracundiam temperare, cum homo intenso dolore permotus, non sit in plenitudine intellectus:’ then he proceeds to distinguish very properly between a just and unjust cause of taking offence, and admits the former to be sufficient to excuse. ‘Si ergo

\* Part 1. Q. 6. n. 6, 16.

‘ justa

‘ justa causa calorem iracundiæ præcedat, ve-  
 ‘ luti si quis ab alio fuerat provocatus, aut  
 ‘ alio modo offensus, tunc is qui ira aut in-  
 ‘ tenso dolore permotus provocantem seu  
 ‘ offendentem interfecit, absque dubio a poena  
 ‘ ordinaria liberabitur.’ Yet Carpzovius is  
 well known to be the severest criminalist that  
 ever put pen to paper; and it is therefore  
 needless to quote more authorities upon that  
 point.

The panel comes now to the law of England; the doctrine of which, with regard to homicide, he is advised, is the very perfection of human reason. That law proceeds in this matter upon the principle that *ira furor brevis est*; and therefore it holds, that homicide committed while the *furor brevis* occasioned by provocation continues, is excuseable homicide, or manslaughter, not murder; but if committed *ex intervallo*, after the blood has had time to cool, it is murder. So the law of England is laid down by Judge Foster \*, who is quoted by the prosecutors themselves. ‘ I now proceed, he says, to that species of felonious homicide which we call manslaughter; which, as I have before observed, the benignity of our law, as it standeth at present, imputeth to human infirmity; which, though, in the eye of the law, criminal, yet

\* Crown Law, dis. 2. ch. 5.

‘ is

' is considered as incident to the frailty of the  
 ' human frame.'—' The cases falling under  
 ' the head of manslaughter, which most fre-  
 ' quently occur, are those where death en-  
 ' sueth upon a sudden affray, and in heat of  
 ' blood, upon some provocation given or con-  
 ' ceived.'—' What degree of provocation,  
 ' and under what circumstances, heat of  
 ' blood, the *furor brevis*, will or will not  
 ' avail the defendant, is now to be considered.'  
 Then he proceeds to state a variety of cases,  
 which shall by and by be taken notice of; and  
 then he adds, ' But in these, and indeed in  
 ' every other case of homicide upon provo-  
 ' cation, how great soever it be, if there is  
 ' sufficient time for passion to subside, and  
 ' for reason to interpose, such homicide will  
 ' be murder: A. finds a man in the act of  
 ' adultery with his wife, and in the first  
 ' transport of passion kills; this is no more  
 ' than manslaughter; but had he killed the  
 ' adulterer deliberately, and upon revenge,  
 ' *after the fact, and sufficient cooling time, it*  
 ' had been undoubtedly murder; for let it  
 ' be observed, that in all possible cases, de-  
 ' liberate homicide, upon a principle of re-  
 ' venge, is murder. No man, under the pro-  
 ' tection of the law, is to be the avenger  
 ' of his own wrongs.' This last sentence  
 the prosecutors quote, but they prudently  
 leave out all that went before. Numberless

autho-

authorities might be accumulated upon the same point, but it would be superfluous, as it is notorious that such is the law of England. But though the panel will quote no more authors, yet he will beg leave to transcribe a passage from a pleading of the solicitor-general of England, in a late very remarkable case; as that pleading demonstrates, that the above distinction is not confined to books, or only adopted by contemplative lawyers, but that it is universally admitted in practice, and in cases of the greatest importance and expectation. In summing up the evidence against Lord Byron, Mr. Solicitor General began as follows \*: ' The noble prisoner at the bar is charged with having killed Mr. Chaworth deliberately and maliciously, and, in the terms of the indictment, with malice aforethought. That he killed him is a truth beyond dispute; and he who takes away the life of another, is presumed to have taken it away deliberately and maliciously, till it shall appear to have been the effect of necessity, of accident, or of *sudden passion*; for as necessity will justify, and accident excuse the fact, an *ungovernable transport of passion* will so far alleviate the crime, as to make that which would otherwise have been murder and a capital offence,

\* Lord Byron's trial. p. 37.

‘ man-

‘ manslaughter only, which saves the life of the offender. This is a condescension the law shews to the frailties of the human mind, which, upon great and sudden occasions, cannot command itself, or maintain its reason.’

The panel, in the last place, comes now to consider the law of Scotland, which he hopes, both for his own sake, and that of his country, will be found to be not singularly absurd and unmerciful, but that it adopts the same just and humane distinction. Slaughter of aforethought felony was anciently, as well as now, capital by the law of this country; but slaughter on a sudden quarrel and provocation was not capital; it was called *chaude melle*, and the slayer had relief by the privilege of girth and sanctuary; in the same way as the slayer had relief by the privilege of the city of refuge among the Jews, and as he has by the benefit of clergy among the English. It is of no consequence in what form a man is freed of punishment, if he be freed.

The counsel for the prosecutors, in their information, is pleased to deny, that *chaude melle* was not capital by our old law; and in support of this position adduces some of the arguments urged in the above-mentioned information for Mr. Carnegie’s prosecutors, which are founded chiefly on misconstructions of some parts of our old law; at the sam

I time

time he says, it is a matter of no great consequence, whether it was so or not; because he says, and truly, that the act 1661 must regulate the matter. All the arguments used to prove that *chaude melle* was capital by our old law, are fully and most satisfactorily confuted in the \* above-mentioned information for Mr. Carnegie; to which the panel begs leave so far to refer, contenting himself with ingrossing the different old statutes we have upon that subject *verbatim*, and in their order.

James I. parl. 3. act 51. intituled, of forethought felony and *chaude melle* statutes,  
 ‘ That as soon as any complaint is made to  
 ‘ justices, sheriffs, bailies, &c. they shall in-  
 ‘ quire diligently, *i. e.* without ony favour,  
 ‘ gif the deed was done upon forethought  
 ‘ felony, or throw sudden *chaude melle*, and *gif*  
 ‘ *it be found forethought felony*, the life and  
 ‘ goods of the trespasser to be in the King’s  
 ‘ will: and *gif* the trespass be done of sudden  
 ‘ *chaude melle*, the party skaithed shall follow,  
 ‘ and the party transgressor defend after the  
 ‘ course of the old laws of the realm.’

James I. parl. 6. act 89. intituled, ‘ The  
 ‘ Manslayer suld be pursued, until he be put  
 ‘ forth of the realm, or brought again to the  
 ‘ place of the slauchter.’ (The act appoint-

\* From p. 68. to p. 92.

ing the method of pursuing manslayers) statutes, ' That quahairever he happens to be taken, that scheriffes, stuart, or bailie of the regality, fall send him to the schiriffes of the next schiriffdom, the quhilk fall receave him, and send him to the next schiriffe, and swa forth from schiriffe to schiriffe, quhill he be put to the schiriffe of the schire where the deede was done; and there fall the law be ministred to the partee, and *gif it be forethought felony be fall die therefore.*'

James I. parl. 6. act 95. intituled, ' Of inquisition of forethought felonie to be taken by an assise,' statutes, ' That the of ficeares (*i. e.* the judges ordinary) fall give them the knowledge of an assize, *quibidder* it be forethought felonie, or fuddainelie done: and, gif it be fuddainelie done, demaine them as the law treatis of before; and, gif it be forethought felonie, demaine them as law will.'

James III. parl. 5. act 35. intituled, ' Of flauchter or forethought felonie of fuddaintie and flying to girth.' ' *Item*, because of the eschewing of great flauchter, quich has been richt commoun amang the King's lieges nowe of lait, baith of forethought felonie, and of fuddaintie; and, because monie persons commit flauchter upon forethought felonie in trust, they fall be defended through the immunitie of the halie

' kirk and girth, and passis and remainis in  
 ' sanctuarees, it is thought expedient in this  
 ' present parliament, for the stanching of the  
 ' said flauchters in time coming, *quairever*  
 ' *flauchter is committed on forethought felonie,*  
 ' and the committer of the said flauchter  
 ' passis and puttis him in girth for the safe-  
 ' tie of his persone, the scheriffe fall cum to  
 ' the ordinar in places, quhair he lies under  
 ' his jurisdiction, and in places exempt to  
 ' the lords masters of the girth, and let them  
 ' wit sick a man has committed sick a  
 ' crime on forethought felonie, *tanquam in-*  
 ' *fidiator et per industram, for qubilk the law*  
 ' *grantis not, nor leavis sick persons to joyis*  
 ' *the immunitiis of the kirk.* And the sche-  
 ' riffe fall require the ordinar to let a knaw-  
 ' ledge be taken be an assise on fifteen daies,  
 ' quhidder it be forethought felonie or not;  
 ' and gif it be founden forethought felonie,  
 ' to be punisht after the the kinges laws:  
 ' And *gif it be founden suddentie, to be restorit*  
 ' *again to the freedom and immunitie of the*  
 ' *of the halie kirk and girth.*

James. IV. parl. 3. act 28. intituled,  
 ' Anent manslayers, taken or fugitive, sta-  
 ' tutes, ' That where onie happens to be slain  
 ' within the realme, the manslayer fall be  
 ' perseived (in a certain manner) and quhair-  
 ' ever he happens to be certane, that the  
 ' scheriffe fall incontinent send him to the

' next

‘ next scheriffe, and swa foorth quhile he be  
 ‘ put to the scheriffe of the schire quharr the  
 ‘ deed was done, and there fall justice be in-  
 ‘ continent done; and gif it be forethought  
 ‘ felonie to die therefore.’

James V. parl. 4. act. 23. intituled, ‘ The  
 ‘ masters of the girth suld mak deputes quha  
 ‘ suld deliver malefactours that may not  
 ‘ bruik the priviledge thereof,’ statutes,  
 ‘ That they suld halden in all time coming,  
 ‘ to deliver *all committers of flauchter upon*  
 ‘ *forebrought felonie*, that flies to girth, and  
 ‘ uthers trespassers that breakis the samen,  
 ‘ and may not bruik the priviledge thereof,  
 ‘ conform to the common law, and the act  
 ‘ of parliament maid thairupon, of before to  
 ‘ the kings officires askand and desereand  
 ‘ them to underly the law.’

As to the act 1661, which is no doubt  
 the standing regulating statute in this coun-  
 try with regard to homicide, the panel is  
 advised that it is decisive for him, as it puts  
 our law much upon the same footing with  
 that on which the law of England stands.

The title of this act is ‘ Concerning the se-  
 ‘ veral degrees of casual homicide.’ Its  
 words are, ‘ Our Sovereign Lord, &c. for  
 ‘ removing of all question and doubt that  
 ‘ may arise hereafter in criminal pursuits for  
 ‘ slaughter, statutes and ordains, That the  
 ‘ cases of homicide after following, viz. ca-  
 ‘ sual

‘ sual homicide, homicide in lawful defence,  
‘ and homicide committed upon thieves and  
‘ robbers breaking houses in the night ; or  
‘ in case of homicide the time of masterly  
‘ depredation, or in the pursuit of denounced  
‘ or declared rebels for capital crimes, or  
‘ of such who assist and defend the re-  
‘ bels and masterful depredators by arms,  
‘ and by force oppose the pursuit and  
‘ apprehending of them, which shall hap-  
‘ pen to fall out in time coming, nor any  
‘ of them shall not be punished by death ;  
‘ and that notwithstanding of any laws or  
‘ acts of parliament, or any practice made  
‘ heretofore, or observed in punishing slaugh-  
‘ ter : But that the manslayer, in any of the  
‘ cases aforesaid, be affoilzied from any cri-  
‘ minal pursuit pursued against him for his  
‘ life for the said slaughter, before any judge  
‘ criminal within this kingdom. Providing  
‘ always, that in the case of homicide casual,  
‘ and of homicide in defence, notwithstand-  
‘ ing that a slayer is free from capital pu-  
‘ nishment, yet it shall be liesome to the cri-  
‘ minal judge, with advice of the council, to  
‘ fine in his means to the use of the defunct’s  
‘ wife and bairns, or nearest of kin, or to  
‘ imprison him. And his Majesty, with  
‘ advice aforesaid, declares, that all decisions  
‘ given conform to this act, since the 13 Fe-  
‘ bruary 1549 years, shall be as sufficient to  
‘ secure

‘ secure all parties interested, as if this pre-  
 ‘ sent act had been of that date; and that all  
 ‘ cases to be decided by any judges of this  
 ‘ kingdom in relation to *casual homicide in de-*  
 ‘ *fence*, committed at any time heretofore,  
 ‘ shall be decided as is above expressed.’

\* The passage quoted from Skene, to prove he thought *chaude melle* capital by our old law, is absolute nonsense as it stands; instead of these words, ‘Or *casual homicide by chaude melle*, the reading ought to be ‘not *casually*, or by *chaude melle*,’ otherwise he contradicts himself, and cites acts of parliament which prove the contrary of his position; and likewise he would contradict what he says in his treatise *de verborum significacione* under *chaude melle*, which he observes is in Latin *rixa*: ‘A hot sudden tul-  
 ‘ zie or debate, which is opposed as contrary  
 ‘ to forethought felony;’ and cites the act of James I. But how is it contrary or opposite to forethought felony in our law, if the effect or punishment of both be the same. And upon the words, *forethought felony*, he says, ‘Foirthoct felony, *precogitata malicia*,  
 ‘ quilk is done and committed wittinglie  
 ‘ and willinglie, after deliberation and *set*  
 ‘ purpose, it is different from *chaude melle*,  
 ‘ qui ut scribit Cicero, c. i. offic. In omni

‘ in iustitia per multum interest utrum per-  
 turbatione aliqua animi, quæ plerumq; brevis  
 est et ad tempus, an consulto et cogitato fiat  
 injuria leviora, enim sunt ea, quæ repentina  
 aliquo motu accidunt, quam quæ me-  
 ditata et preparata inferuntur.’ From  
 which it is evident, that the authority of  
 Skene is point blank against the prosecutors  
 on this question. \* And to the same purpose,  
 Sir James Balfour, Lord President of the  
 Court of Session, in his practices, under the  
 title *Slauchter*, gives the following summary  
 of our old law, even before the statutes above-  
 mentioned: And it is, to wit, ‘ That na-  
 ‘ slauchter done be chance or *chaude melle*,  
 ‘ SOULD BE CALLIT MURDER, for  
 ‘ all murder is COMMITTIT OF FOIR-  
 ‘ THOCT FELONIE, &c.’ These, and  
 many other authorities that might be quoted  
 from our most ancient law-books, such as  
*Regiam Majestatem*, make it clear as the me-  
 ridian sun, that, for many centuries before  
 the act 1661, slaughter on a suddenly was  
 not capital by the law of Scotland; but that  
 it was put on the same footing on which it  
 stands in England, where it had relief by the  
 benefit of clergy; which, though at first too  
 much confined, has for ages past been ex-  
 tended to all sorts of persons.

\* Inform. p. 512.

As it is clear from *the above* recital of the statutes previous to this act, that the distinction betwixt slaughter of forethought felony, and slaughter on sudden provocation or *chaude melle*, took place in this country; and as that distinction is founded upon the principles of justice and humanity, it is impossible to believe it was meant to be abrogated in 1661, when our law had obtained to some degree of maturity, and the notions of our judges and lawyers must have been much more liberal than they had been in former times: accordingly the act 1661, was by no means intended to be severer than our former laws; on the contrary, it gives a more certain and consistent remedy than that of girth and sanctuary, by discharging the capital punishment to be inflicted; and, at the same time, wisely provides, that bloodshed, where an excess had been committed, should not escape altogether, but be punished arbitrarily, according to the circumstances of the case.

This act is a transcript of an act that passed in 1649, during the usurpation. Its title above-mentioned, it is clear, was not put upon it unadvisedly; for it is *verbatim* the same with the title of the act 1649; and the title itself demonstrates, that by casual homicide was not understood homicide purely accidental; for it is palpable that such homicide

K cide

cide admits of no degrees, and is no ways punishable. But the act makes use of casual homicide in the title as a general term that comprehends all homicide not committed from felony aforethought, as a term that comprehends not only homicide, purely accidental or *per infortunium*; but homicide on sudden provocation, homicide in defence, &c. all which kinds of homicide, as already said, may, with great propriety, be termed casual; for the meeting of parties was casual, their quarrel casual, and even the stroke or wound may not improperly be said to be casual, seeing it was not the consequence of *deliberation* and *design*, but of a mechanical impulse of nature, and given *casu magis quam voluntate*.

It appears from the act, that either some abuses had crept in, or some doubts had been entertained, which it was desirous to correct and remove; and it does correct and remove them if the panel's interpretation be just, as far as any law could do; for it leaves premeditated murder to be punished capitally as formerly. It discharges other kinds of homicide to be punished with death; but, at the same time, as excesses might very readily be committed, it reserves a power to the Judges of this Court, to inflict an arbitrary punishment in such cases, and nothing can be better sense. Our law is, by this statute,

statute, put upon a still better footing than the law of England ; for, by that law, manslaughter now-a-days always escapes with an elusory punishment, though circumstances must very often call for a real one.

To maintain that by casual homicide, the act means homicide *per infortunium*, is extravagant to the highest pitch. The very title, as already said, demonstrates the contrary ; and so, in a peculiar manner, does the last proviso, ‘ That all cases to be decided by any judges of this kingdom, in relation to *casual homicide in defence*, committed at any time heretofore, shall be decided as above expressed.’ This affords another invincible argument to prove, that the act by casual homicide did not understand homicide *per infortunium*, but homicide committed *in rixa*, or on a sudden quarrel ; and from this it likewise follows, that there is nothing in an observation made by the prosecutors, ‘ \* That if the legislator had meant and intended, that wilful and intentional homicide, committed on suddenly, was not to be punished capitally, it would not have been particularly mentioned ;’ for it is particularly mentioned as *casual homicide in defence*, which cannot possibly mean any thing else. The act wisely does not enter into a minute explanation of what should be reckoned casual ho-

\* Prosecutors Inform. p. 7.

micide, and what homicide from felony aforethought, for it is impossible by general rules to ascertain them ; circumstances only can do it ; but it is clear as sunshine, that this statute ties up the hands of the Judges of this Court, from punishing with death homicide that shall appear not to be committed from felony aforethought, but on a sudden provocation ; though it very properly allows them to inflict an arbitrary punishment where there has been an excess, or other circumstances that require it.

The panel having thus stated what he takes to be the doctrine of the law of Moses, of the Roman law, of the commentators on that law, of the law of England, and the law of Scotland ; and proved, he is hopeful, that they all agree in this, that homicide on a sudden quarrel and provocation is not to be punished with death ; he shall now proceed to consider, how far that doctrine will avail him in this case ; or, in other words, to shew, that the provocation he received from Lord Eglinton was sufficient to excuse, either in whole or in part, the homicide charged against him, supposing, but not admitting, that he committed it intentionally, as the indictment alleges.

Here the panel must again call attention to the different steps of Lord Eglinton's

con-

conduct, and of his own, as set forth in the indictment.

And, 1st, It is admitted that Lord Eglington, not the panel, was the provoker, or *auctor rixæ*, which, in all cases of this kind, is, and always ought to be held, a very material circumstance.

2dly, That the panel received several verbal injuries from Lord Eglington, having been charged with hunting in breach of promise, and a demand made upon him for his gun, which every man knows, and must feel to be, injurious and affrontive. That verbal injuries alone are sufficient to justify or excuse homicide, the panel never maintained; a great part of the argument in the information of the prosecutors proceeds upon supposition that he had; but it is a mistake: some lawyers have indeed thought so; but the contrary is no doubt the better opinion; for verbal injuries may be easily avoided, and completely redressed by retortion; but the panel does maintain, that in computing what amounts to sufficient provocation, verbal injuries are to be taken into the scale. He has no occasion to plead the point higher, for it is not pretended that upon receiving the verbal injuries just now mentioned he fired his piece, or even shewed any resentment; the fact is, that he did not even fail in respect, but with much civility and submission en-

deavoured to soften his Lordship, and abate the passion to which he had been instigated by Bartleymore.

3dly, Lord Eglinton soon proceeded to a real injury, by advancing upon, and assaulting the panel, in order to take by force that gun which was his lawful property and possession. In order to constitute a real injury, it is not necessary that hands be laid on, or blows given; it is a real injury, if a hand be lifted, or a cane shaken over a man's head, \* *Si quis pulsatus quidem non est, verum manus adversus eum levatae, et sæpe territus quasi vapulaturus, non tamen percussit utili injuriarum actione tenetur.*" And by parity of reason, the advancing upon a man, and obliging him to retire, in order to avoid being seized, or thrown down, must be a real injury.

4thly, It is alledged in the indictment, that the panel told Lord Eglinton, that he would not give up his gun, but would sooner shoot him; and afterwards confirmed this warning by an oath, his passion being by that time roused by the continuance of the assault.

5thly, The panel retired for a considerable time and space from before Lord Eglinton.

† L. 15. par. 1. ff. de injus.

6thly,

6thly, The panel in retiring was thrown down with violence upon his back ; and this fall, in the eye of law and reason, must be held to have been given him by Lord Eglinton, for it was his Lordship's assault that drove the panel upon the stone that was the immediate occasion of his fall ; and therefore, it was in reality his Lordship's act : suppose the panel, instead of being thrown by this fall upon his back among sand, had been precipitated from a height, and drowned in the sea, or bruised to death among rocks, would not Lord Eglinton have been answerable for his death ? most certainly ; and his Lordship would at least have been guilty of culpable homicide, as he was *versans in re illicita*, and had no title to take the panel's gun by force ; and therefore the panel was intitled to resent this fall, as being the act of Lord Eglinton.

7thly, The indictment does not alledge that the panel fired his piece till he could retire no more : it is evident that he was far from being in a hurry to fire his piece. He once and again threatened that he would do so ; but that was plainly only to intimidate ; for, it is not pretended, that he fired till he fell, till he could retire no more, and till he was more violently agitated and irritated by that accident.

8thly, It will be considered, that it is not pretended the panel had any time to cool or reflect,

reflect, for the indictment sets forth, that the piece was fired upon his fall.

9thly, The place where the panel was should be considered. It is admitted he was alone on the sea-shore, where he could not have the interposition of a magistrate, or the succour of neighbours to assist him.

10thly, It is not pretended that the panel had any other weapon than his gun. When a man is assaulted, or otherways injured, and has a variety of weapons about him, some lethal, some not, there may be reason for alledging that he commits an excess, if he uses the lethal, without first trying what the less hurtful will do: but this will not apply to the panel's case, as he had no other weapon but his gun; and the severest criminalists hold, that no excess can be charged against a man who uses the only weapon that he has. Carpzovius himself is express upon this. After inculcating in general, that the defence should be proportioned to the offence; he adds, ' *† Quod tamen verum est, nisi ag-  
grefforis robur et fortitudo suppleat quod  
armis ipsius deest, aut aliud non sit in promptu  
ipsi insultato ad defendendum telum.* Si enim  
multo major, robustior et fortior fuerit  
agressor quam provocatus, etiam *duriori* *telo*  
hic illum occidere vel debilitare potest im-

† P. 1. Q. 29. n. 25, 26, 27.

‘ punc

‘ punē et si aggressor *solo pugno* vel manu va-  
 ‘ cua insultum faciat, aut baculo invadit ali-  
 ‘ quēm, cui inpromptu non sit aliud instru-  
 ‘ mentum, quam gladius, is bene tueri se illo  
 ‘ gladio potest, neque dicetur moderationem  
 ‘ inculpatæ tutelæ excedere.’ Nothing can  
 be more in point than this passage, and num-  
 berless authorities are quoted in support of  
 its doctrine.

If such a suit of injuries, verbal and real, do not amount to sufficient provocation, the panel is at a loss to comprehend what will. He is persuaded, that every unprejudiced person will be sensible that they do. However, for further satisfaction, he shall produce several authorities, both foreign and domestic, to prove that position.

Real injuries, not near so atrocious, have been again and again adjudged in England to be sufficient provocation: ‘ \* Neither can ‘ he,’ says Hawkins, ‘ be thought guilty ‘ of a greater crime (viz. manslaughter) ‘ who, finding a man in bed with his wife, ‘ or being actually struck by him, or pulled ‘ by the nose, or filliped upon the forehead, ‘ immediately kills him; or who happens to ‘ kill another in a contention for the wall, or ‘ in the defence of his person from an un- ‘ lawful arrest.’ And he cites reports for proving every one of these positions, and several

\* Pleas of the Crown, vol. 1. p. 82. in fine.

others to the same purpose, which the panel shall not transcribe; but shall only observe, that Baretti was very lately acquitted, though it was proved, and indeed not denied, that he had stabbed a man with a knife, and the only provocation was shoving him off the pavement into the street. The panel submits, if the provocation he received was not more than a fillip on the forehead, &c.

And several persons have been acquitted for homicide in this country, where the provocation was not greater or so great: for the argument upon which Finhaven was acquitted, was, \* ‘that, if he had killed Bridgeton after the provocation above set forth, it would have been constructed only as casual or culpable homicide.’ Now the provocation, set forth in his defences, was, that he had been thrown into a kennel by Bridgeton. But the libel in that case was, and could not but be, found relevant, because the special matter for the panel was not admitted as it is in this indictment.

In the case of William Hunt, mentioned by the prosecutors, the court did, ‘§ *separatim*, find, that the stroke being given *in rixa* or a tumult, when the defunct was author of the tumult or *rixa* himself, or that the stroke was given in defence of the panel,

\* See his Information in the trial, p. 37, 38.

§ See their Inform. p. 42.

‘ or any of his fellow-soldiers when attacked,  
 ‘ relevant to restrict the libel to an arbitrary  
 ‘ punishment.’

And in the case of Ensign Bruce in 1690, the court ‘ found this defence, that the panel ‘ was assaulted by the robber, who cried Fire ‘ upon the dogs, or the like expressions, be- ‘ fore any intimation was made to them that ‘ the guard was come up, relevant to restrict ‘ the libel anent the slaughter to an arbitrary ‘ punishment.’

And in the case of Bruce of Auchinbowie in the year 1709, the distinction betwixt murder and manslaughter was expressly admitted by the judges of this court. Bruce, the panel, there pleaded her Majesty’s act of indemnity, in bar of the prosecution: to which it was answered, that wilful murder was excepted from the indemnity. But it was replied, that the exception in the act of indemnity only respected murder or felony aforethought, not slaughter committed on suddenly; and the interlocutor of the court ‘ sustained the defence of her Majesty’s most ‘ gracious act of indemnity, proponed for ‘ the said panel, relevant to elide the said ‘ libel.’ Does not this decision acknowledge, in the most express terms, that there was a difference in our law betwixt murder and manslaughter?

But the case on which the panel chiefly relies, and to which he intreats the utmost attention, is that of Peter Maclean in 1710, which is precisely similar to the present. In that case the interlocutor was in these words: ‘Find the indictment relevant to infer the pains of death, and sustain the defence proponed for the panel in these terms, that the defunct quarrelled the panel under the name of *rascal, how durst he carry a fowling-piece,* and that if the prince had his own, he durst not do so; and adding these words, that her Majesty was but a whore, *and thereupon assaulted the panel* for taking the CARRABINE from him, relevant to restrict the libel to an *arbitrary punishment.*’

The panel is advised, that this case is not so strong as his; for it is not alledged, that Maclean had retired, or that he had been irritated by a fall before he fired; both which circumstances occur in the panel’s case, and must plead strongly in his behalf with every unprejudiced heart. The prosecutors say, this case does not apply, because the gun Maclean had was the King’s; but, if such a circumstance could have any influence, it would make Maclean’s case rather still more serviceable to the panel; for, if a man may kill another in defence of a gun that is not his property but only his possession, *a fortiori* may he kill in defence of a gun that is not only

only in his possession, but is his property; however, it would seem, that it was a fowling-piece Maclean had; but this is of no consequence.

The panel now comes to the second thing proposed, which was to shew, that if a homicide was committed in this case, it was justifiable, or at least excusable, because committed in lawful defence against an attack upon property, honour, and life; and to ward off, repel, and prevent a danger imminent to all the three.

A man, it is certain, owes many duties to his neighbour; but it is certain, that he likewise owes many duties to himself; and that these last are prior, and paramount to the former; for which reason, it is obvious, that a man not only may, but that he ought to preserve his own life, when attacked, though at the expence of the aggressor's; and that it is not only lawful for him to do so, but that he is blameable if he does not. His blame, perhaps, is carried too far by some casuists, who maintain, that a man who, rather than a kill another, suffers himself to be killed, is *felo de se*, or guilty of suicide; but he is certainly highly blameable, as he has transgressed the duty he owes to himself, which is prior and preferable to that he owes to others. This is obvious and indisputably clear from the desire of self-preservation, which is implanted in all animals,

animals, and is strongly enforced by the fear and abhorrence of death and destruction, which they all feel in the strongest degree; whereas the duty men owe to one another is not near so powerfully inculcated. If there be an original and moral sense of it, daily experience teaches, that it may be weakened by education or habit, and silenced and subdued by opposite inclinations or desires. The difference between the stimulus to these different duties is admirably well expressed by Cicero \*, 'Est igitur hæc, judices, non scripta  
 ' sed nata lex; quam non didicimus, accepi-  
 ' mus, legimus, verum ex natura ipsa ar-  
 ' ripuimus, hausimus, expressimus; ad quam  
 ' non docti sed facti, non instituti, sed imbuti  
 ' sumus; ut si vita nostra in aliquas infidias,  
 ' si in vim, si in tela aut latronum, aut ini-  
 ' micorum incidisset, omnis honesta ratio esset  
 ' expediendæ salutis. Silent enim leges inter  
 ' arma, nec se expectari jubent, cum ei qui  
 ' expectare velit, ante injusta pœna luenda  
 ' sit quam justa repetenda; etsi persapienter  
 ' et quodam modo tacite dat ipsa lex potesta-  
 ' tem defendendi.'

And as it is a man's duty to defend his life, so likewise is it his duty to defend his honour, without which his life, at least in a

\* Orat. pro Milone, c. 4.

social state, is of little value. And as it is a man's duty to defend his life and his honour, so likewise is it his duty to defend his property, without which he cannot enjoy the other two with comfort and pleasure. The end for which society was originally instituted, and the reason for which men continue in it, is the preservation of their being, and well being, that is, the preservation of life, reputation, and property.

Any person who will reflect upon what gave rise to the formation of society among men, must be satisfied, that it was the oppression which the weak met with from the strong; when the persons or possessions of the weak were attacked by the strong, the natural impulse of self-preservation and self-defence made them exert themselves; but by the superiority of force their resistance was over-powered. This led them to unite, in order that their joint force might accomplish what individual resistance could not do: from which it is evident, that it never could be the end or intention of any set of men, in entering into society, to suppress and supercede the natural exertion of private resistance or defence; but, on the contrary, it is most palpable, that the end of their entering into society was to obtain, for that principle, a subsidiary and suppletory assistance.

At the same time, though it is clear that private resistance or defence was not to be superseded by the social union, yet private revenge and reparation most undoubtedly were. This the public utility and peace required; because, if reparation or revenge were allowed to be taken in that way, it would commonly be unreasonable and excessive, and would besides give rise to endless tumult and confusion. Hence it is, that the laws of all countries, though they not only tolerate, but enforce private resistance or defence, yet prohibit and punish private reparation or revenge.

This prohibition upon individuals to redress or revenge their own wrongs is not at all inconsistent with the above explained indulgence, which the law shews to the sudden emotions men feel from injury and provocation; for the law does not justify what is done in consequence of these emotions upon this principle, that it is allowable to individuals to redress or revenge their own wrongs; it only excuses them in compassion to the frailty of human nature. Hence the law permits no retaliation of wrongs, *ex intervallo*, when the impulse is over. If that happens, the principle of law, that redress of wrongs must not be taken by individuals, exerts itself with vigour and severity, except in some cases, where redress cannot be had from human laws:

laws: even in these cases the statutes of most countries have made regulations against taking redress in that way; but it has commonly been found impracticable to execute them, and therefore such method of redress, though prohibited by statutes *in terrorem*, is, however, in a great measure connived at every where.

But from the principle, that no man is entitled to use violence to redress or revenge wrongs already done him, or recover a property or possession already taken from him, it by no means follows, that a man is not entitled to use violence to *prevent* a wrong from being done him, or to prevent his lawful property or possession from being taken from him.

If the law will not allow an individual to redress wrongs already done, or to recover a possession already taken from him, far less will it countenance the man who injuriously attacks his neighbour for that purpose. It would be absurd and incongruous in the law to do so; for he who makes such attack, flies in the face of all law, contemns its authority, and renounces its protection; and accordingly, the law not only refuses to protect such person, but arms itself against him. It not only permits the person attacked to resist him, but affists the person attacked, if overpowered; and it is not only just, but expedient in the

law to give liberty of defence to the person attacked. It is just, because, though in some cases † human laws may give complete redress, in many cases they cannot, and the more free a country is, the more difficult it is to obtain such redress as it can give, as Montesquieu very justly remarks.

It would be unjust in the law to make the person attacked omit a complete remedy, which he has in his own hand, and betake himself to a remedy almost always defective, and sometimes totally unavailable for obtaining redress, which is the case with regard to life and honour, and, for the most part, even with regard to property, as shall be shewn at large afterwards.

It would be inexpedient in law to do so; because, so apt are men to transgress against one another, that every preventive check is necessary; and the first and most efficacious of all is the dread of the principle of resentment and self-preservation, which the aggressor is conscious his attack must rouse in the person offended. The interposition of the law is justly made subsidiary to this principle; but foolish and fatal would it be to make it suspensive of it; for it is evident, that robberies, murders, and crimes of all sorts, would be infinitely [more frequent if the hands of indi-

† *De l'Esprit des Loix.*

viduals

viduals were tied up from resisting them: and therefore they never were, by the laws of any country, tied up from resistance or defence in order to prevent wrongs from being done.

The last restriction is absolutely necessary; because, without it, every wrong or breach of the peace would occasion another. But before a wrong or injury is done, and while it is attempting, the aggressor is violating the law, and disturbing the peace; so that nothing would be gained to either, by discharging resistance and defence. On the contrary, such prohibition would have the very worst consequences both to the law and the public peace, as it would be a spur to violence and outrage on the part of wicked men, and bring an insufferable hardship on the good subject and citizen, who would be obliged to submit to injuries, for which the law can almost never give him complete redress, and for the most part but a very inadequate compensation. For these reasons, the law of every country permits violence to be used in lawful defence. The expediency is clear, and so is the justice; for when a man attacks the person or property of another, he contemns and renounces the laws of society, and brings himself and the person attacked into a state of nature; and by the law of nature they must be judged, unless municipal regulations come in the way; for the law of nature is the common law of every

country, except in so far as it is modelled and restricted by the municipal law.

This reasoning is important, and the panel hopes it is clear and convincing. He is persuaded every man's own reflections and feelings will tell him it is so; so that the quotation of many authorities would be unnecessary.—

*Non tali auxilio.* However the panel shall state some that are capital. ‘ *Qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt, vim enim vi defendere, omnes leges, omniaque jura permittunt. Sed si defendendi mei causa, lapidem in adversarium misero, sed non eum sed prætereuntem percussero, tenebor lege aquilia. Illum enim solum qui vim infert ferire conceditur, et hoc si tuendi dumtaxat, non etiam ulciscendi causa factum sit.*’ L. 45. § 4. ff. ad leg. Aquil.

‘ *Eum igitur qui cum armis venit, possimus armis repellere; sed hoc confessim non ex intervallo. Dummodo sciamus non solum resistere permisum ne dejiciatur, sed etsi dejectus quis fuerit eundem dejicere non ex intervallo sed ex incontinenti.*’ L. 3. §. 9. ff. de vi et vi armata.

Lord Stair is likewise express upon this distinction. His words are: ‘ † The entry to possess that which is already possessed, must expel the prior, or else introduce a partial

† Inst. p. 174.

and

and common possession; yet it is not the contrary attempts, or every act that expels the prior possessor; but if the same be violent, the prior possessor hath the benefit of a possessory judgment, and may lawfully use violence to continue in possession, which afterwards he may not for recovery thereof, when it is lost, though unwarrantably or violently, unless it be *ex incontinenti*.

To the same purpose Lord Bankton. No doubt one with us may continue or recover his possession by force, being *ex incontinenti*, or instantly before the other party has got the possession; for after that he must take the legal course, and not *fibi jus dicere*, do right to himself.

Since then it is clearly lawful to use force and violence in defence, the utmost degree of them must be permitted if necessary. That must be permitted if necessary to defend life; that must be permitted if necessary to defend honour; that must be permitted if necessary to defend property. The defence of the person is indeed the most important, and makes the greatest figure in the imagination; but the defence of the other two is equally lawful, where there is a necessity, which must be understood *secundum subjectam materiam*, and the *moderamen inculpatæ tutelæ* is observed in all of them, when their preservation cannot be otherwise effected. And so is to be understood

stood *L. 1. cod. unde vi.* ‘ *Recte possidente ad defendendam possessionem, quam sine vitio tenebat inculpatæ tutelæ, moderatione illatam vim propulsore licet.*’

This is clear from various texts of the civil law, the doctrine of which is very well summed up by Heineccius in these words : ‘ *† Quo in primis moderamen inculpatæ tutelæ pertinet, quoquis adgrediore, vi injusta irruentem, imminentि vitæ, corpori, rebusve periculo incontinenti tuendi sua causa occidit.*’

Gomez, in his treatise *de Homicidio*, has a passage that is very applicable in many particulars to this case, especially as to the present point. He is there talking of defence of the person ; and after several observations, he adds this one : ‘ *Etiam si aggressor veniat et resulteret contra alium diverso genere armorum, puta cum baculo, ligno vel instrumento, animo percutiendi, et inferendi sibi injuriam, nam aggressus potest ei resistere, et se defendere cum ense vel ferro, vel quavis alio instrumento fortiori : et si eum occidat cum aliter ab illa injuria non posset evadere, non tenetur aliqua poena, quia talis defensio est licita pro defensione rerum, ut in L. furem ff. ad leg. Corn. de sic. et in L. itaque ff. at L. Apud. et in L. 3,*’

† *Pand. lib. 9. § 185.*

§ *cum*

§ cum igitur ff. de vi armata; et in L. 1.  
 C. Unde vi, cum simil. ergo a fortiori pro  
 defensione personæ et honoris quæ dignior  
 est, ut in L. in servorem, § fin. ff. do pœ-  
 nis, cuius pulchra verba sunt. Quia et  
 solus fustium iætus gravior est quam pecu-  
 niara damnatio; ut in L. Julianus, versi-  
 cul. 1. ff. Si quis omissa causa testamenti.  
 Imo quod magis est, hoc procedit et habet  
 locum eadem ratione, etiamsi aggressor ve-  
 niat et resultet contra alium sine aliquo ge-  
 nere armorum, sed tantum *manu vacua* mi-  
 nans eum, et volens alapam prebere; nam  
 si aggressus aliter illam injuriam, evadere,  
 non possit licite poterit eum occidere; et in  
 expresso ita tenet Bald.

The same doctrine is taught by Grotius:  
 † Veniamus ad injurias quibus res nostræ  
 impetuntur. Si expletricem justitiam respi-  
 cimus, non negabo ad res conservandas rap-  
 torem, si ita opus est, vel interfici posse; nam  
 quæ inter rem et vitam est inæqualitas ea,  
 favore innocentis est raptoris odio, compen-  
 satur, ut supra diximus. Unde sequitur si  
 ad jus solum respiciamus posse furein cum  
 re fugientem, si aliter res recuperari ne-  
 queat, jaculo prosterni. Demosthenes ora-  
 tione in Aristocratem. Nonne hoc per  
 Deos durum atque injustum est, nec scriptis

† De jure belli, c. 1. l. 2. § 11.

' tantum legibus, sed et communi inter ho-  
 ' mines legi contrarium, ut non finar vi uti  
 ' adversus eum qui hostiliter res meas ra-  
 ' piat? Nec obstat caritas per modum præ-  
 ' cepti, lege divina humanaque seposita, nisi  
 ' res sit que minimum valeat, ac proinde  
 ' contemni mereatur: quam exceptionem  
 ' recte nonnulli adjiciunt.

Cocceius, chancellor to the King of Prussia, a lawyer whose works have the greatest reputation and authority over all Europe, in his commentary on the above passage of Grotius, expresses himself thus:—‘ Nos jure naturæ etiam pro defensione rerum occidi furem posse statuimus: idque ex rationibus supra, allatis extra omne dubium ponitur, ubi simul probavimus evangelii legem jus hoc naturæ, quod in suo genere perfectum est, non improbare, nedum tollere; sed saltem nobis inculcare perfectius et generosius esse amittere rem suam, quam jure suo cum internecione alterius uti.’ And soon after he adds, ‘ Quod jus arcendi injuriam non oriatur ex aliqua proportione, neque ex qualitate injuriæ, sed ex jure necessariæ defensiones, vi cuius omnia mihi licent sine quo jus a natura mihi concessum et si minimum, et exigui momenti salvum esse non potest.’

And the same great author, in his treatise, intituled, *Introductio ad Grotium illustratum*,

tum, in treating of *bellum privatum*, holds killing to be lawful: ' † Si periculum est  
 ' mutilationis membra, vel violationis pudi-  
 ' citiae; si periculum imminet accipiendae  
 ' alapae, aut mali similis; si de defensione  
 ' rerum nostrarum agitur, etiam si sit res  
 ' minima.'

The law of England is also express upon this point; Hawkins\*, to confirm his position, That one may kill another who attempts to kill him, supports it by this argument: ' Is not he who attempts to murder me more injurious than he who barely attempts to rob me?' Indeed that one may kill in defence of his goods in England, is a proposition that has been innumerable times illustrated by examples in that country, where robberies are extremely frequent.

Neither was this ever doubted of in this country, and that so the law stands is admitted by the prosecutors in their information †. ' It may be lawful (say they) in defence of one's property, to kill a robber who feloniously endeavours to bereave him of it; because without so doing his property may be lost.' And this holds not only of robbers by night, but likewise of robbers by day. For though the act 1661 discharges the killers of robbers

† L. 7. c. 2

\* Vol. I. p. 72.

‡ Page 17. in fine.

by night from punishment altogether, whatever the circumstances of the slaughter may be, it does not from thence follow, that the killer of a robber by day is to be punished. Such killing falls under the general exception of the statute of casual homicide in self-defence, which by the statute cannot be capitally punished, though in particular circumstances it may be arbitrarily.

The law of nature, as has been already said, is the law of every country, excepting in so far as it is modelled and restricted by municipal statutes. Our statute 1661 is far from abrogating the natural right of defence. On the contrary, it tolerates and protects it in the greatest latitude, and for that purpose uses the very general expression of *lawful defence*. It does not use the expression in *self-defence*, for that might be thought only to extend to the defence of the person, or life; but it uses the comprehensive expression of *lawful defence*, which extends not only to the defence of the person and life, but to the defence of reputation and goods.

From what has been argued it is clearly established, that it is lawful to kill in defence of one's goods; and this proposition is not controverted in the information for the prosecutors, in which they endeavour to shew, that it cannot avail the panel, because of the particular circumstances of the case: and their

argu-

argument is \*, ' That no man is intitled to kill in defence of his property, unless when he is attacked with a felonious intention to rob and bereave him of his property; but where the person who makes the attack has clearly no felonious intention, but only under an erroneous apprehension of his own right, commits a trespass upon the property of his neighbour, and for which redress can easily be had in a court of law, in so far as the party has been injured. The law of no civilized country will, in these circumstances, allow a person to kill another under the pretence of defending his property.' And they afterwards apply this position to the present case, as follows: ' It is plain, that the deceased Earl had no such intention. He could not have been charged as being guilty of felony, if, *de facto*, he had seized and carried off the panel's gun: he did not thereby intend feloniously to rob and bereave the panel of his property. He was led to make the demand under the belief and apprehension, that the law intitled him to make the seizure. Whether he was right or wrong in that apprehension, is to the present issue very immaterial. If he was mistaken, all that could be charged against him, if he carried off the gun, was

\* *Informat.* p. 16.

' a com-

‘ a common trespass, upon which he might  
 ‘ have been subjected, in a civil action, to re-  
 ‘ store the gun, and to indemnify the panel of  
 ‘ what expences he should incur in making  
 ‘ his claim effectual, and what damages he  
 ‘ could qualify he had sustained by the seizure  
 ‘ or detention.’ And in support of this several  
 authorities are quoted.

This is the only argument, in the information for the prosecutors, that has any shew of plausibility: but when it is impartially and thoroughly examined, it will appear that there is nothing in it. What are the secret springs and motives in a man’s breast to any action, human judges and human law-givers cannot possibly know; and therefore they must presume the motive to be bad, if the action itself be bad and hurtful. This holds in all criminal questions. Thus if a man is killed by another, the presumption is against the killer, and it lies upon him to prove a relevant defence, such as accident, lawful defence or provocation; unless, as in this case, some of these be admitted in the charge against him.

In the same way, if a man’s goods are taken away from him with terror and violence, the law must hold that to be robbery without inquiring into the intention, which it is impossible to know with certainty. The person that took them may, perhaps, have done  
 so

so with an intention to give them in charity, or to relieve some person in very great want of them, or he may have intended to restore them ; but that cannot be known with certainty. His intention may have been as well to take them *lucri faciendi causa* ; and be his intention what it may, a man has lost his goods, and has been put in fear, and therefore it is robbery.

What Lord Eglinton's intentions were, cannot certainly be known ; the only thing certain is, that he attempted to take the panel's gun from him by force and fear, as he advanced upon the panel, and sent for a gun to shoot him. It is very possible, that the final cause of Lord Eglinton's violence was not to reap any advantage by having the property of the gun ; but that it was to insult and punish the panel for his imagined offence ; yet that is not certain, and it is far from being impossible that a man of high rank may covet a dog or gun of remarkable value. But be his Lordship's motive what it may, certain it is, that he meant to appropriate the gun to himself, and as force and fear were employed, the act came up to the definition of robbery ; and if the panel's life could not be taken for the homicide, upon supposition that his Lordship's act had proceeded from covetousness, it would be hard that the panel's life should be taken upon a bare presumption that his Lordship's

ship's motive was not such, without any proof, which it is absolutely impossible to bring as to intentions.

Lord Eglinton, it has been already shewn, had no right, by the game-law, to take this gun; the matter therefore comes to be tried by the common law, and by it, it is clearly *prima facie* robbery; and an indictment for robbery might have been most relevantly drawn against his Lordship; and, if he had demurred to the relevancy upon this, that he was entitled to take the gun by the game-law, that plea, for the reasons above explained, most certainly would have been overruled. At the same time, it is possible, nay highly probable, that Lord Eglinton would not have been found guilty of robbery by any jury upon the above indictment; for the case of a panel is always favourable, and the law ought never to be stretched against him; and therefore the jury, in all probability, would have listened to his plea, that he had been led to commit the violence from an erroneous apprehension of the game-law, and, from different circumstances, would have presumed that his motive was anxiety for preservation of the game, and punishment of one whom he took to be a transgressor. But though it were certain that Lord Eglinton would have been thus gently dealt with by a jury, and though it were clear that such an equitable stretch in

his favours were right; yet it does by no means therefrom follow, that what was certainly robbery in strict law shall be held by interpretation not to be robbery, in order to come at the panel's life. However excusable and proper it may be to make equitable stretches and constructions, in order to save a man's life, it would be unprecedented and most unjust to make such stretches and constructions, in order to take it.

However, the panel's defence will not be hurt, though it should be reckoned clear in point of law, that this was not a robbery in Lord Eglinton. It is sufficient, that it be an unlawful and *violent* attempt to take his property from him; and there can be no doubt it was that. It was what is called *vis privata*, by the Roman law; a trespass *vi et armis*, by the law of England, and what is called a spulzie in the law of this country, and a spulzie aggravated by the concomitant circumstances of force and fear.

The panel has no occasion to maintain, that it is justifiable to kill a man trespassing privately, *clam*, and by stealth; but he does maintain, and it is established by the authority of all laws and lawyers, that it is justifiable, or at least excusable, to kill a trespasser who uses violence. This is even laid down by

Dam-

Damhouderius \*, quoted by the prosecutors. That lawyer has taken into his head to maintain (very probably from the love of singularity, which has misled many a man) this very strange proposition, that it is not lawful to kill a thief either by day or night; and after throwing together several observations in support of it. He adds: 'Ex his nunc clare colligetur, quod non est licitum occidere furem diurnum aut nocturnum, nisi is *plus* sit quam fur, aut *plus* quam fur esse præsumatur.' And a little below he adds: 'Si meam personam quispiam invaderet, egoque citra periculum invadentem possem effugere; profecto in eo casu plane tenerer effugere (uti et supra dictum est) si vero quispiam mea peteret invadere *bona*, non tenerer hoc casu invasorem effugere, quando quidem mea fuga grave mihi posset, bonorum meorum inferri dispendium. Si preterea me quispiam adoriretur, ita ut in arctam me constringeret periculi angustam; in hoc casu e vestigio tenerer meipsum fortiter, ad alterius etiam interencionem (si effugere non detur) defendere, & non per intervalla temporis uti dictum est supra; verum si quispiam bona mea *violenter* surripere conatur, aut me extrudere possessione mea; in casu, possem me defendere contra adversarium.'

‡ C. 78. n. 3, 4, &c.

And

And Clarus, who is likewise quoted by the prosecutor: ‘ Hæc autem conclusio quod pro sui defensione, liceat alium interficere locum habet, non solum pro defensione vitæ et corporis sui, sed etiam pro defensione rerum suarum. Et hæc est communis opinio legistarum. Nam (ut vulgo dici solet) bona et res vitæ æquiparantur.’ What he says of a thief, which the prosecutors quote, goes upon supposition, that he uses no violence; but, if he defends himself with a weapon, he holds that he may be slain *impune*.

The truth is, that by far the greatest number of the doctors hold, that it is lawful to kill in defence against an attack upon property only: some of them hold it not to be justifiable, but culpable to kill in defending property only: but they all agree in one voice, that it is justifiable to kill, when both person and property is attacked, which always must be the case, when the property is annexed to the person: and such was the panel’s case.

Covarravious, an eminent canonist, is one of those who have some doubts, not if it be excusable, but if it be completely justifiable, to kill in defence of property alone; but he is perfectly clear, that there is not the least doubt, if the property is annexed to the person, so that both are and must be attacked at once. His words are\*: ‘ Oportet expendere

\* Opp. vol. i. p. 607. n. 6. p. 609.

an ille sit irregularis qui hominem occiderit,  
 non ad propriæ vitæ necessariam defensio-  
 nem, sed ad patrimonii & rerum tutelam,  
 & sane probatur hunc non esse irregularēm,  
 quia licitum est cuique defendere proprias  
 res, et ad earum necessariam defensionem  
 hominem invasorem occidere; nempe eo  
 casu quo res aliter defendi non potest ab in-  
 vasione et rapina.' He then proceeds to  
 state some doubts and difficulties, which he  
 clears by stating different cases; two of which  
 are very much to the present purpose: Pro-  
 ponitur ea species in qua contingit homici-  
 dium ad necessariam defensionem rerum, ne  
 ab aggressore capiantur; & profecto licitum  
 esse hoc homicidium, deducitur ex multis,  
 quæ superius adducta fuere; presertim ubi  
 raptor bonorum defendantem res proprias a  
 rapina, vult offendere quo ad personam;  
 quemadmodum frequentissime accedere po-  
 terit: nam cum quis a raptore defendit res  
 proprias, aut raptor abstinet a rapina, & tunc  
 jam nullius occisionis adest casus, aut ipse  
 contendit, ad huc invito defensore, res ra-  
 pere, non potest ea contentio expediri ab-  
 que injuria & damno personali defensoris,  
 idcirco homicidium inde secutum pertinet  
 ad defensionem personæ simul & rerum.'

This is in point to the present case, for  
 the panel's property was annexed to his per-  
 son, and so both were, and could not but be,

at-

attacked at once. Had Lord Eglinton got hold of the panel, it is clear he must, and would have mal-treated his person, in order to get his property from him; and his sending for the gun demonstrates, that he was resolved to master and destroy the person, in order to take the property. There is very good reason for holding, that it is culpable to kill a trespasser *by stealth*, and that it is justifiable to kill a trespasser by violence, from the former there is no danger, but there is from the latter, especially, if passion and resentment give rise to the trespass, and if the property which the trespasser wants to take be a weapon; which was the case here. Lord Eglinton was, and could not but be in the fire and fury of passion; anxiety for the preservation of the game was his foible, and he must have been provoked by the panel's imagined transgression upon it. He must have been greatly irritated by the panel's refusing to give up his gun, and heated to the utmost pitch by the panel's threatening to shoot him rather than give it up. Indeed, this is but too evident from his Lordship's exposing himself so long to a loaded fowling-piece, which the indictment says was cocked, and presented at him, and the excess of his rage is put out of all doubt, by his sending for his own gun to shoot the panel. The panel, therefore, had all the reason in the world to expect, that if

his Lordship got possession of the panel's gun, he would have put him to death with it. He had not indeed reason to expect this, when Lord Eglinton came first up to him, and demanded his gun; and it is to that period that part of the declaration mentioned by the prosecutors refers; \* but, he had all the reason in the world to expect it, after his Lordship had been irritated and provoked by the circumstances above-mentioned; and the panel, if necessary, can prove, that Lord Eglinton sometimes beat people with their own guns, after he had taken them; what then would he not have done to the panel who had so much provoked him?

The English authorities are likeways clear for the panel upon this point. § Thus Hawkins, ' Neither can a man *justify* the killing of another in defence of his house, or goods, or even of his person, from a bare private trespass; and therefore, he that kills another, who, claiming a title to his house, attempts to enter it by *force* and shoots at him, or that breaks open his windows, in order to arrest him, or that *perfests* in breaking his hedges, after he is forbidden, is *guilty of man-slaughter*. And he who, in his own defence, kills another, who assaults him in his own house in the

\* Infor. p. 22.

§ Vol. I. p. 72.

day-time, and plainly appears to intend to beat him, only is guilty of homicide, *se defendendo*, for which he forfeits his goods, but is pardoned of course; yet, it seems that a private person, and, *a fortiori*, an officer of justice, who happens inavoidably to kill another in endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of public justice.

Here it is most justly laid down, that killing a trespasser by force, though perhaps not strictly justifiable, is at least excusable, so as to be held only manslaughter, the punishment of which is elusory. This passage is much more accurate than that \* quoted by the prosecutors from an after-part of the book, which at first will appear to be inconsistent with the former: but it will not appear to be so upon reading the whole passage, of which the prosecutors only transcribe a part, because of the limitation it contains, and the authority upon which it is grounded, which is a passage in Keylynge †, which supposes the trespass to be already done, and confirms the distinction above established between *redressing* and *preventing*.

\* Inform. p. 19.

† P. 131.

The last authority the panel shall quote upon this point, is a very capital one, being no less than that of Lord Chief Justice Hale; his words are, \* 'If a man comes to take my goods as a *trespasser*, I may justify the beating of him in defence of my goods, as hath been said: BUT IF I KILL HIM, IT IS MAN-SLAUGHTER.' What answer can the prosecutors make to this, or what answer to the decision of this court in Maclean's case, which goes upon the same principle?

† The authorities quoted from the law of England by the prosecutors do not in the least impugn the above doctrine: on the contrary, they support it. Foster says, ' The injured party may repel force with force in defence of his person, habitation, or *property*, against one who manifestly intendeth or endeavoureth, with violence or surprize, to commit a known felony upon either.' The panel says, that Lord Eglington did attempt, with violence and surprize, to commit a known felony upon his property. But supposing it was only a trespass, where hath Foster said, that the killer of a violent trespasser is guilty of murder? Blackstone's doctrine is the same with his.

\* Pleas of the Crown, vol. 1. 48. C. in fin.

† Inform. p. 18.

As to the authority of Puffendorff, which the prosecutors refer to, upon examination it will be found to be against them. In a passage previous to that quoted by the prosecutors, he expresses himself thus: ‘ Mais, lors que ces voies de douceur ne suffisent pas pour nous sauver, ou pour nous mettre en sûreté, il faut en venir aux mains. En ce cas là, si l’agresseur continue malicieusement à nous insulter, sans être touché d’aucun repentir de ses mauvais desseins qui le porte à vouloir désormais vivre en paix avec nous, on peut le repousser de toutes ses forces en le tuant même, s’il est besoin ; et cela non seulement lors qu’il attaque directement notre vie, mais encore s’il ne veut que nous battré, nous meurtrir, ou nous priver de quelque membre qui ne soit pas absolument nécessaire, ou nous *depouiller de notre bien* : Car on n’a aucune assurance, que de *commencemens* il n’en viendra pas à plus grandes injures ; et des la qu’un homme se declare notre ennemi, comme il le fait en nous-insultant sans nous en temoigner ensuite aucun deplaisir il nous donne en tant qu’en lui est, une pleine, et entiere permission d’agir contre lui de toutes nos forces, sans mettre aucunes bornes à notre juste defense.’

\* Barbeyrac’s Puffendorff, Droit des Gens, p. 256.

This he holds to be the law of nature ; and though indeed, in the passage quoted by the prosecutors, he seems to think it ought to be somewhat limited in a state of society ; yet it is plain his limitation chiefly points at the redressing or revenging wrongs already done ; for he admits the right *repousser* or *depellere*, in order to prevent an irreparable loss : what he reckons such, he does not say.

But, with great submission to him, if the law of nature stands as he says in the first paragraph, there is no foundation, even in the social state, for limiting the right of preventing wrongs : for the law of nature is the common law of every country, except in so far as already said, it is modelled and restricted by the municipal law. However, be his opinion what it may, it can never be put in opposition to the accumulated authorities above stated of the most eminent German and English Lawyers. Besides he has no where said, that homicide in defence of goods is murder, and not manslaughter. This, in a subsequent passage, he leaves entirely to be regulated by the municipal laws of different countries ; and to be sure, from what he says in the first passage, he thought there was nothing immoral in killing in defence of goods, nor any thing improper in legislatures regulating defence in what manner they think expedient ; and to these regulations, he says,

their

their subjects should conform. \* Mais dans une société civile on n'a pas à beaucoup pres une liberté aussi etendue de defendre ses biens, à main armée, et la raison en est claire. Car si pour la moindre injure on pouvoit en venir à des actes de hostilité contre un concitoyen, ce seroit une source de troubles et de desordres perpetuels. On ne doit donc user de ce droit, qu'autant que la constitution du gouvernement civile et les loix particulières de l'état nous le permettent. Ou quoique les législateurs puissent laisser à chacun une pleine liberté de repousser un agresseur jusqu'à lui rendre un plus grand mal que celui qu'il vouloit faire, cependant ils défendent d'ordinaire aux particuliers de se porter aux derniers extrémitez pour ne pas se laisser ravir une chose qui n'est pas irreparable.'

The law of this country, it has been already proved, permits homicide in defence, in the utmost latitude; and indeed it would have been very unnatural if it had not; as otherwise the men of the most generous spirit in it must have been ensnared, and its best blood unjustly shed on the scaffold, because of the *præfervidum Scotorum ingenium*, which has always impressed them with a high sense of honour, and impelled them to quickness of resentment; on which account, the motto of the country is *nemo me impune lacebit*.

The prosecutors are pleased to observe, that if the panel's † doctrine were solid, it would follow, that Lord Eglinton might have been justified for killing the panel, in attempting to come upon his Lordship's lands against his will.

To this the panel answers, that supposing his Lordship to have had a title to hinder the panel from coming upon his lands, a homicide committed by his Lordship upon him, so trespassing, would have been murder, or justifiable or excusable homicide, according to circumstances. If the trespass had been done by stealth, the homicide would either have been murder or homicide highly culpable. If done violently with danger, or offence to his Lordship's person, the homicide would either have been justifiable or excusable homicide.

\* The prosecutors are likewise pleased to say, that if an heretor, who is not well acquainted with his marches, should attempt to poind his neighbour's cattle, which *de facto* were not trespassing upon his property, it is impossible to maintain that a homicide committed upon him, by the proprietor of such cattle, would be justifiable, though the cattle really were upon their master's ground.

† Inform. p. 16.

\* Inform. p. 17.

To this the panel answers, that it is perfectly clear, that if such poinding were attempted by force, and the poinder warned of his danger, the homicide would at least be excusable, so as to amount to no more than manslaughter.

The narrowness of this country has prevented such cases from occurring in it; but in England many such cases have happened, and in England homicide in cases, much narrower than any of the cases above put, has been adjudged to be manslaughter, as will appear from the following authorities. Hawkins justly set forth, that, \* ' the killing of an officer would, in some cases, be manslaughter only. Where the warrant upon which he acts, gives him no authority to arrest the party; as where a bailiff arrests J. S. a baronet, who never was knighted: where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest man; or perhaps if he arrest one on a Sunday, since 29 Car. 2. chap 7. by which all such arrests are made unlawful.'

To the same purpose Foster, whose authority the prosecutors acknowledge, † ' In the case of arrests upon process, whether by writ or warrant, if the officer named in

\* Page 86.

† Dif. 2. c. 8. § 7, 8, 9.

the process give notice of his authority, and  
 resistance is made, and the officer killed,  
 it will be murder ; if in fact such notifica-  
 tion was made, and the process *legal* ; for  
 after such notification, the parties opposing  
 the arrest acted at their own peril.  
 I have said above, by way of caution,  
 if the process be *legal* ; but I would not  
 be understood to mean any thing more than  
 provided the process, by writ or warrant,  
 be not defective in the frame of it, and issue  
 in the ordinary course of justice from a  
 court or magistrate having jurisdiction of  
 the case. But if the process be defective  
 in the frame of it, as if there be a mistake  
 in the name or addition of the person on  
 whom it is to be executed ; or if the name  
 of such person, or of the officer, be inserted  
 without authority, and after the issuing of  
 the process ; or the officer exceedeth the  
 limits of his authority, and is killed, this will  
 amount to no more than manslaughter in  
 the person whose liberty is so invaded.

These authorities afford a good answer to  
 the cases put for the prosecutors, and an in-  
 vincible argument for the panel in this affair.  
 For the most favourable light in which Lord  
 Eglinton's attack can be viewed, is that of  
 an unlawful or erroneous *private* arrest.  
 Now, if homicide in defence against an er-  
 roneous *public* arrest be excusable, much  
 more

more must homicide be excusable in defence against an erroneous *private* arrest. And it is clear, the doctrine of the law of England on this point is most excellent good sense; for he who attacks another's person or property with violence, does it at his peril. If the attack was warranted by law, the homicide will be murder; if not, the homicide will be, and ought to be, no more than manslaughter. This is still clearer in violent private arrests or trespasses. Mankind, no doubt, ought to curb their passions, and it is one of the chief objects of law to restrain them: but then the passion of the aggressor is the *origo mali*; that necessarily rouses the passion of the person attacked, and the shewing some indulgence to his passion, can have no bad effect in society. On the contrary, it has a manifest tendency to preserve good order and peace, by affording an immediate and effectual check to lawless aggressors.

As to the argument drawn from the property in question being but a gun, and consequently of no considerable value, there is nothing in it. A prosecution for theft would have lain against any person who had stole this gun, or who had robbed the panel of it\*. Indeed, the violent taking away from the per-

\* Hawkins, vol. I. p. 65.

son of another goods of any value, and putting him in fear, is robbery. However, if the value were to enter into consideration, that would not avail the prosecutors; for the gun was very valuable.

But the value does not at all enter into consideration, for this, among other reasons, that the value of a subject depends upon the opinion and affection of the proprietor; and this holds in all sorts of property †, in immoveables, moveables, and animals, for which the proprietor may have, and commonly actually has, an infinite greater value than indifferent persons. This is called the *premium affectionis*, and takes its rise from the *association of ideas* which has a great effect upon the human mind. Hence a man has a *premium affectionis* for the farm in which he was born, or has cultivated himself.

In the same way a man has a *premium affectionis* for an animal he has bred up and cherished. This is beautifully illustrated in Nathan's parable to David ‡: ' He came unto him, and said unto him, There were two men in one city, the one rich and the other poor. The rich man had exceeding many flocks and herds, but the poor man had nothing save one ewe-lamb, which he had bought and nourished up, and it grew up

\* See Locke's *Essay*, Book 2. c. 83.

‡ 2 Sam. ch. xii. ver. 1. *et seq.*

• toge-

• together with him and his children ; it did  
 • eat of his own meat, and drank of his own  
 • cup, and lay in his bosom, and was unto  
 • him as a daughter : and there came a tra-  
 • veller unto the rich man, and he spared to  
 • take of his own flock and of his own herd  
 • to dress for the wayfaring man that was  
 • come unto him ; but took the poor man's  
 • lamb and dressed it for the man that was  
 • come to him. And David's anger was  
 • greatly kindled against the man ; and he  
 • said to Nathan, As the Lord liveth, the  
 • man that hath done this thing shall surely  
 • die.'

This is a decision of a judge after God's own heart, which proves that the value is immaterial ; and if that judge thought it was just to punish the rich man with death, after he had taken away the lamb, he also must have thought it just in the poor man to have resisted the rich man, even to the last extremity, in defence of the lamb.

And even for trifling moveables men have the same *preium affectionis*. There are few persons who have not had in their possession, some time or other, moveables which to them were of inestimable value from the association of ideas, though to others they would appear trifling, such as a ring, a cane, &c. This feeling was well understood by an author justly celebrated for his knowledge of human nature;

nature; and upon it one of his most masterly performances is founded, the catastrophe being accomplished by the loss of a handkerchief. He introduces a husband giving his wife a handkerchief, with this solemn instruction :

*Make it a darling like your precious eye ;  
To lose't or give't away were such perdition  
As nothing else could match. —*

The panel had the same feeling and *preium affectionis* for his gun, which was a valuable one and an old companion ; and the circumstance of his being an old soldier contributed much to make him determined rather to part with life than with his gun. Every soldier reckons it the greatest disgrace to have his arms taken from him : no wonder then the panel thought, with regard to his gun, that

*To lose't or give't away were such perdition  
As nothing else could match.*

As to the argument, that the law ought not to allow killing in defence of property, because that may be recovered by legal process, there is nothing in it either.

The legal remedy, in order to obtain restitution and reparation, must and cannot but be

be extremely defective; unless the robber or trespasser please, it never can give restitution, except in the case of unmoveables, such as land or houses; and even these the invader may damage irreparably, by destroying the planting on an estate, the paintings and ornaments in a house, &c. but in moveables, after the possession is taken away, the property is for ever gone, unless the robber or trespasser pleases; for he may put them away or destroy them; it is only in things called fungible, such as money, that restitution can certainly be got.

And, as to reparation by damages and costs, they are very seldom given to the full extent, and a *preium affectionis* is never allowed \*.  
 ‘ Sextus quoque Pedius ait, *pretia rerum non ex affectione, nec utilitate singulorum, sed communiter fungi.* Itaque eum qui filium naturalem possidet, non eo locupletiorem esse, quod eum plurius, si alius possiderit redempturas fuit. Nec illum qui filium alienum possiderit tantum habere quanti eum patre vendere posset. In lege enim aquilia consequimur et *amississe* dicemur, quod ut consequi potuimus, aut erogare cogimur.’—And, as to costs, it is well known they are so taxed by all courts of justice, that the party prevailing never gets all

\* L. 33. pr. ff. ad leg. ad Aquil.

that he has disbursed in personal expences and other articles : and hence an English satyrist † introduces a man saying, ‘ That he had been ruined by a decree which he had obtained in Chancery, with costs.’ From all which it is evident, that the law cannot give restitution ; so that when a moveable is ravished from a man, all that remains with him is a claim at law for a thing of a different nature, *viz.* compensation by a sum of money, which, for the most part, is inadequate.

Besides, in a free country, the law is, and must be extremely tedious and expensive. In Turkey, it is believed, the panel might have recovered his gun, or the value of it, in a few hours, and at the expence of a few shillings : in this country, it is perfectly clear, that Lord Eglinton might, and in all probability would, have put the panel to the trouble of a litigation for two years, and the expence of L. 200 sterling, before he got either gun or value : a process might have been brought for it, no doubt, before the sheriff, and might soon have been ended before that judge ; but then it was removeable by advocation into the Court of Session, and from that court, by appeal, to the House of Peers ; and it is a moderate computation to allow but two years, and L. 200 sterling for the endurance and ex-

† Swift

pence

pence of such a course of litigation, which, in all probability, Lord Eglinton would have carried through on account of his anxiety for the game-law, and other circumstances. We have seen, not very long ago, all that course of litigation run for subjects of still less value than this musket. Not many years ago a question about a rolling-stone was litigated before the Sheriff, and afterwards removed into the Court of Session by advocation. The fact, it is believed, appeared to be, that a large rough stone had been wrongfully taken by one person from the quarry of another, and shaped into a rolling-stone, and the question was, whether the proprietor of the quarry had an action for the rolling-stone, or only the value of the stone in its original state; because of the specification by which it had been fashioned from a block unto a roller; this was the subject of a hearing and informations, and the court, it is believed, very justly decreed that the plaintiff should recover 5s. and the defendant retain the stone.

This cause did not go to appeal; but a question about a Highland ox \*, not so valuable as the panel's gun, was not only obstinately litigated before the court of Session, but an appeal taken and prosecuted before the house of

\* 1746. M'Farlane against Napier. See Blackst. Com. b. 3. c. 24. par. 1. n. 9.

Lords, and the plaintiff having only got three guineas as the value of the ox, but no costs, suffered greatly by the victory.

The panel by no means mentions these cases with a view to reflect on the law of this country, which he is sensible is as efficacious and expeditious as the law of any free country can be: but the law of every country must be defective, and the law of every free country must be tedious and expensive; hence, it is a maxim that *beati possidentes*, which is emphatically translated by an old proverb, mentioned by Lord Stair, ‘ Possession is nine ‘ points of the law:’ and therefore, such being the nature of legal remedies, it would be absurd and unjust in the law, as argued above, to supersede the natural right of defence against violence, which is a complete and effectual remedy, and oblige persons attacked to submit to injuries, and betake themselves to a remedy almost always inadequate and incomplete.

What has been argued above will, it is hoped, suffice and satisfy as to the right of private defence, in order to prevent a robbery or trespass upon property.

The panel comes therefore to the next circumstance in his favour, under this branch of the argument, viz. That the defence here was lawful, being made in order to preserve his honour; for the panel holds it to be clear and

and notorious, and what every man's feelings must evince, that the forcibly taking a man's gun from him is a most atrocious injury and affront, as it implies and expresses the greatest superiority and contempt on the part of the taker, and the utmost meanness and pusillanimity on the part of the person who suffers it to be taken.

The prosecutors in answer to this contend, that honour is not a *nomen juris* \*.

This is a mistake, as the panel is advised, and all the lawyers which the prosecutors themselves quote upon other points, are agreed against them upon this. Thus Clarius in the place above quoted; 'Idemque  
' et multo magis dicendum est, quod liceat  
' alicui alterum interficere pro defensione pro-  
' prii honoris, nam periculum famæ æquipa-  
' ratur periculo vitæ.' In the same way Puffendorff: 'Comme presque tous les peuples  
' du monde mettent l'honneur au même rang  
' que la vie, on a la raison de soutenir que  
' chacun peut aussi le defendre, en tuant  
' même celui qui veut le lui ratur.' And in the same way Carpzovius: 'Cessit quoque  
' poena gladii in homicidio necessaria, quod  
' non dolo sed coacte ob vitæ, corporis, ho-  
' noris, facultatumque defensionem commit-  
' titur.' For the same reason, Grotius and

\* Informat. p. 12.

Cocceius, above-mentioned, hold it lawful to kill in order to avoid a kick or a blow; and so likewise says Hawkins in the passage above recited, where many authorities are quoted.

The prosecutors were pleased to proceed to observe, that it was \* ' rather too ludicrous to say, that a man whose former rank in life was no other than that of a common soldier, and who at present is an inferior officer of excise, was in honour called upon rather to take away the life of his fellow creatures, than yield the possession of his gun.'

But with submission, the observation upon the panel's rank and office in life might have been spared; it is of the middling kind, and it did not, nor could not deprive him of the title he had to be treated like a gentleman; that he had such a title is most certain; he was the son of a gentleman; as well born as any in Scotland. It would be very hard upon the gentlemen of this country, many of whom, though of very ancient and honourable families, have but small estates, if their sons were to be degraded from the rank and consideration of gentlemen, because their fathers, on account of the *res angusta domi*, or the expence attending a numerous family,

\* Inform. p. 12.

were not able to breed them to the most lucrative and honourable employments. He who is born a gentleman, and has not misbehaved, is entitled to be treated as such, whatever his circumstances may be. Belisarius, even when he begged, did not forfeit the character. But whether the panel be a gentleman or not is really of no consequence; for he is a British subject, and, as such, entitled to resent and resist every attack accompanied with injury or affront, even from the greatest lord.

The prosecutors next proceed to argue that the panel's behaviour upon the occasion was dishonourable; for that if he had been a man of honour, he ought to have done one of two things; and first, they say, he ought ' to have laid aside his gun and engaged with the Earl upon equal terms.'

This is indeed too ludicrous; for it means, if it means any thing, that the panel should have given up his gun, or allowed it to have been taken by Lord Eglinton or his servants, which must have been the consequence of his laying it aside, and then offered to box Lord Eglinton. Now, supposing that an offer to box was proper for a man of honour, yet it would have been very unreasonable to have required the panel to do so; for Lord Eglinton was the younger and stronger man, so that the panel would have been

been no match for him, as he, though naturally a strong man too, is advanced in years, and afflicted with several infirmities.

\* The other alternative which the prosecutors give the panel is, ' He ought to have challenged him to single combat, and have waited till the Earl was properly armed for that purpose; but when in place of following that course (which might have been expected from one who pleads the point of honour) he pours a loaded musket into the bowels of a man unarmed and totally defenceless, the action must be condemned not only as barbarous and cruel, but as most dishonourable.'

This argument is purely rhetorical, and, like all the other arguments of the prosecutors, calculated to lay a snare for the prejudices of mankind. Had the panel, when Lord Eglinton came first up to him and gave him bad names, instantly fired upon him, he would have acted very improperly. But the panel did not do so: he endeavoured to pacify his Lordship with a soft answer to no purpose; he even, when his Lordship advanced upon and assaulted him, did not fire his piece; he threatened to do so in order to intimidate, but he did not execute his threats; he fled from before his Lordship; (which

\* Inform. p. 12,

by the by is more than many lawyers hold he was obliged to do) he retired for 120 yards, till he could retire no more. If he did fire, what made him do so?—His fall. It is plain from the circumstances of the case, that he did not fire the piece so long as he had the use of his limbs or his temper; but when deprived of both these, when irritated by a fall which was occasioned by an unjustifiable attack, if he did fire the piece, it was neither dishonourable nor murder in the eye of the law.

The panel now comes to the last circumstance under this head, viz. That he acted in defence of his life; and this the panel apprehends can admit of no doubt, for it is not disputed, that, before the panel's piece was fired, Lord Eglinton had threatened to shoot him, and sent his servant for his own gun for that purpose, and that the servant with the gun was come up within two or three yards of Lord Eglinton; after that, either the panel was in *periculo vitæ constitutus*, or else that expression has no meaning.

It is said for the prosecutors, that Lord Eglinton's gun was not loaded; but how could the panel know or suspect that to be the case? Whether it was so or not he cannot say, but certain it is, he believed, and had all the reason in the world to believe, that it was loaded, and that it was sent for in

R order

order to be used for the declared purpose for which it was sent. Upon what principle can it be maintained, that the panel ought to have waited till Lord Eglinton got the gun into his hand, in order that he might be in a capacity to put the panel to death? How would that circumstance have made any difference? Suppose the panel had shot him in that situation, it might still have been pretended, that Lord Eglinton would not have fired his piece. At that rate the panel must have waited till Lord Eglinton fired at him; and if, after that, the panel had killed his Lordship, the prosecutors would have had a still better argument against him, because, after his Lordship's fire was over, it is clear the panel was in no danger of being shot.

But the truth is, that it is only when the beginner of the quarrel has killed the person attacked, and pleads that what he did amounts to no more than manslaughter, that it is requisite, it should appear that parties fought upon equal terms. But when the person attacked kills the aggressor, it is not incumbent on him to shew that they were precisely on equal terms, it is sufficient if he shews that he was in imminent danger, *sufficit terror armorum.* \* So says Gail, and all

\* *De Pace publica.* I. 16. n. 5, et seq.

the rest of the doctors ; and common sense says the same thing ; nay, even *terror armorum* is not necessary, as appears from the passages above quoted from Carpzovius and Gomez, and the authorities referred to by them. Carpzovius, to the passage above quoted, adds, ‘ Nec enim paritas armorum in mode-  
 ‘ ramine inculpatae tutelæ tam exacte et præ-  
 ‘ cise exigitur pro ut late deducet et probat  
 ‘ (here he cites a multitude of authors).  
 ‘ Quin imo cum armorum similitudo et æqua-  
 ‘ litas in æquilibrio civili consistat, cui lex  
 ‘ certa dari nequit, potius geometrica quam  
 ‘ arithmeticæ proportione, et ex circumstan-  
 ‘ tiarum qualitate diligenter inspecta et per-  
 ‘ pensa æstimanda erit. Ita nimis ut si  
 ‘ offensus absque validioribus armis quæ in  
 ‘ promptu habet, saluti suæ consulere queat  
 ‘ innoxie, tunc imparia arma deponere et  
 ‘ compar telum si quod in promptu est arri-  
 ‘ pere debeat : At si incontinenti, periculo  
 ‘ in mora existente, comparari statim par-  
 ‘ telum nequeat, aut evidens imminet per-  
 ‘ culum, puta quod quis adeo subito invada-  
 ‘ tur, vel aggressor longe robustior et fortior  
 ‘ sit, vel invasus in *mignas augustias* fuerit  
 ‘ redactus, tunc etiam ARMIS INERMI  
 ‘ resistere licebit.’—Does not every word of  
 this apply directly to the panel’s case ; it  
 clearly does ; and it is most incontrovertible,  
 that the panel was *in periculo vitæ constitutus* ;

and as the relevancy of this defence is admitted by the prosecutors, there can be no difficulty to sustain it.

It is set forth in the indictment, that the panel fired at the Earl, standing unarmed, within two or three yards of him, and smiling at his accidental fall; which last circumstance, it was said, must have satisfied the panel that his Lordship would have done him no hurt.

The panel has not the least recollection of seeing a smile on the Earl's face that day; on the contrary, it discovered all the symptoms of the utmost wrath and fury; however, if his Lordship did smile, the smile could not be a smile of complacence or good humour, it must have been a smile of triumph and derision, which could only tend to irritate and provoke the more.

It is argued for the prosecutors on this point \*, 'If he was truly apprehensive that bodily harm was intended against him, his only safety lay in keeping up his fire; when the gun was discharged he became defenceless, and could easily be overpowered by such superior numbers:' from which they conclude, that his firing the piece proceeded, not from an apprehension of danger, but the wicked scheme, which 'from the beginning

\* Inform. p. 22.

he appears to have deliberately and firmly resolved, viz. rather to bereave the Earl of his life than to part with his gun, upon a false and groundless apprehension, that the Earl meant to use violence in depriving him of his gun.'

It is very true, that on discharging his piece, the panel became in a great measure defenceless, and exposed to the attack of his Lordship's servants: but from this, all that can be justly inferred is, either that the panel was so bent on hindering Lord Eglinton to take the gun from him, as that he did not mind hazarding his own life for that purpose, or that the panel was so agitated by the fall, as to be incapable to reason or reflect at all; but it can never be fairly inferred from this, that the panel fired the piece chiefly with a view to take Lord Eglinton's life. The argument that he should not have fired, because upon that he became defenceless, is inept and trifling; for, at that rate, he should never have fired, and must have suffered his gun to be taken from him: by firing his piece the panel did all that man could do to prevent the injuries with which he was threatened; and in fact he did prevent them, he hindered Lord Eglinton to take the gun or to shoot him: his servants indeed, it is believed, carried off the gun, as the panel has never heard of it since, but that he could not help; he

did all that man could do to defend his property, his honour, and his life; and the two last he did preserve.

It was not a wicked scheme to resolve to preserve his gun, though at the loss of his aggressor's life and his own; but however, it does not appear that he would have carried the matter so far had he not been deprived of reflection by the fall; for though it is set forth he swore he would shoot Lord Eglinton if he did not keep off, yet it is admitted he did not do so; though his Lordship continued to advance upon him, he retired 120 yards, and if he fired, did not fire till he fell. It is a strange allegiance \*, that ' it was a false and groundless apprehension, that the Earl meant to use violence in depriving him of his gun.' Have neither words nor actions any meaning? did not his Lordship demand it again and again? did not he advance upon the panel in order to take it? did not he send for his own gun in order to make the panel give up his, either from fear, or by putting him to death? after all this can it be said, that it was a false and groundless apprehension to suppose the Earl meant to use violence? Such an argument is a mockery of reason and of justice, and when counsel so able as those for the prosecutors, are obliged to resort to

\* Inform. p. 22.

such shifts, it is a demonstration they are miserably pinched.

From what has been above argued, it is hoped it will appear, that, supposing the panel had committed the homicide charged, he did not commit murder, but only what is called slaughter unawares in the law of Moses, *homicidium in rixa commissum* in the civil law, manslaughter in the law of England, *chaude melle* in the ancient Scottish law, and casual homicide in self-defence in the act 1661.

The panel, perhaps, has not answered minutely all the arguments and observations that are to be met with in the information for the prosecutors: had he done so, this information, which is already very long, must have been much longer; but he has answered all their capital arguments pointedly; and the principles he has established, and the authorities he has quoted, will, he is persuaded, enable every person, who considers them with attention, to detect the fallacy of any argument or observation for the prosecutors, of which he may have omitted to take particular notice. The strange position, that a severe arbitrary punishment ought to be inflicted, even though it should appear that the piece went off by mere accident, merits no answer, neither does the fanatic argument founded on a text of the New Testament.

The panel has only to observe further upon the information for the prosecutors, that it very improperly quotes the law of England, where the prosecutors think it can be of use to them ; but when they see it makes directly against them, it is pretended, that there is no arguing from the law of one country to that of another \*.

To this the panel answers, that it is not upon the statute law of England, but upon the common law, that he founds. He is advised, that it is for him in every point : and that it is clear as sun-shine, if he were to be tried in England, he would not suffer death, but would be either altogether acquitted, or at most found guilty of manslaughter only. If so, the panel, for his own sake, and for his country's sake, hopes that the dictates of the criminal law of England will be listened to. It is the law of a wise and a free people ; it is the law, perhaps, in the world that has been improved by experience and matured by time into perfection ; it is the law that governs our brethren, the inhabitants of the same island, and the subjects of the same king. What an appearance would it have, if a man should be hanged like a dog in this country, who would be dismissed from the English bar, either with impunity or a slight punishment ? The panel

\* Inform. p. 24.

has proved, he knows, he is certain, that the law of England is for him; and if doomed to die here, he, with the rope about his neck, will cast a wishful, though unavailing, look to the South, and lament the day he was born a Scotchman!

But the panel has no reason to apprehend such a fate; for he has already shewn, that the law of his own country is not singularly unjust and unmerciful; but, on the contrary, it concurs with the laws of other countries in distinguishing between murder and manslaughter, and has put the latter on a better footing than it is even by the law of England, as it exempts it from capital punishment, but allows an arbitrary one to be inflicted, if an excess has been committed.

The panel, before concluding, must take notice of one circumstance, which was much insisted on in the pleadings for the prosecutors, though it has been dropped, and not injudiciously, out of their information; he means, the high rank of the deceased Lord, whose death it was his great misfortune to occasion.

The panel is far from meaning to maintain levelling principles: he knows the constitution of this country, has acknowledged different gradations of rank, and conferred certain privileges upon those who hold the higher place; but then the law has been at much pains to fix

their limits ; even the forms of appellation are settled, and the order of precedence has been regulated. A man of rank has a just title to the privileges the law bestows, but he cannot go beyond them ; and if he claims more, and enforces his claim with violence and injury, the meanest subject is intitled to resent and resist.

But the panel is persuaded, that the rank of the noble deceased will make no impression upon any of the honourable persons who may have occasion to form an opinion upon his case. If it does impress any of them, he ought to labour to get quit of such prejudice ; and the best way of doing so is this : let him suppose, that the panel here was not Mungo Campbell the excise officer, but a noble person, equal in rank, and in every other respect, to the deceased : or rather let him suppose, that it is not Mungo Campbell who is under trial for killing Lord Eglinton, but that it is Lord Eglinton who is under trial for killing Mungo Campbell ; and then let him ask his conscience, if, in such circumstances, he could pronounce condemnation ? If his conscience says no, or hesitates about the matter, let such person have a care how he condemns this panel to die.

All the panel requires of mankind is, that they would suppose themselves in his circumstances,

stances, and then ask themselves, if they would have given up their gun? The panel has asked this question at many gentlemen, and the answer he always received was, No. After that, let this question be asked, what then would you have done? Would you have shot Lord Eglinton rather than have allowed it to be forcibly taken from you? This is a trying question. The panel has put it to many, and the answer he always received was, I do not know what I would have done, but I would not have allowed my gun to have been taken. Men who find that their hearts make the same negative or uncertain answer, should have a care how they condemn him to die. The putting a man to death by the hands of the executioner is a homicide: if the sentence be according to law, the homicide is justifiable; if it proceed from an error in judgment, it is excusable; if from partiality or prejudice, it is murder.

This information has drawn out to a great length, but the panel will make no apology on that account; he knows his judges too well to imagine they will grudge time or trouble on such an occasion. If in the course of this long and delicate argument any impropriety of expression has escaped, he hopes it will be believed, that no offence was intended, and that some allowance will be made

even for the anxiety of those that manage his defence, who think it is the duty of counsel to plead, as it is that of judges to determine, without respect of persons.

*In respect whereto, &c.*

JO. MACLAURIN.

APPENDIX.

## APPENDIX.

THE panel, since his information was written, has providentially met with a paper which he thinks of great consequence. This paper is a printed copy of the indictment, as originally drawn by some of the counsel for the prosecutors, the panel supposes Lord Advocate. In the first draught of the indictment, it appears from this copy, that several facts were admitted or set forth, which have been suppressed in the indictment that has been served upon the panel. The printed copy of the first draught of the indictment is as follows: ' Yet true it is and of verity, that you, ' the said Mungo Campbell, have presumed ' to commit, and are guilty, actor, art or and ' part of the said crime, in so far as the de- ' ceased Alexander Earl of Eglinton, having, ' upon the 24th day of October, in this pre- ' sent year 1769, or upon one or other of the ' days of that month, or of the month of Sep- ' tember preceding, or November following, ' gone out from his house of Eglinton in the ' county of Ayr, in his coach, to look at some ' of his grounds; and being told by one of ' his servants, when upon the road from Salt- ' coats to Southenan, within the parish of ' Ardrossan and said county of Ayr, that he ' observed

observed two persons, one of them with a gun, at a small distance, upon his Lordship's ground; upon which the Earl, who, by an advertisement in the news-papers, had forbid all unqualified persons to kill game within his estate, came out of his coach and mounted a horse, which was led by his servants, and unarmed, leaving in his coach an unloaded gun *with powder and shot*, he rode towards the two persons, who in the mean time went off the Earl's grounds into the adjacent sands; and he having come near to the two persons, and discovered the one with the gun to be you, the said Mungo Campbell, he accosted you by saying, "Mr. Campbell, I did not expect to have found you so soon upon my grounds, after the promise you made me when I last catched you, when you had shot a hare; and the Earl having thereupon desired you to deliver your gun to him, you refused so to do; and, upon the Earl's approaching towards you, you cocked your gun and presented or pointed it at him; and upon the Earl's then saying, 'Sir, will you shoot me?' you answered, that you would, if his Lordship did not keep off; to which the Earl replied, that if he had his gun he could shoot pretty well too, or used words to that import, and desired a servant to bring his gun from his coach, which was then

then at some distance ; and the Earl having  
dismounted and walked towards you, lead-  
ing his horse in his hand, and without  
arms or offensive weapons of any kind, you  
retired or stepped backwards as he approached,  
and continued to point your gun at him,  
desiring his Lordship again to keep off, or  
by God you would shoot him : and a ser-  
vant near to the Earl having begged of you  
for God's sake to deliver your gun, you  
again refused, saying, you had a right  
to carry a gun ; to which Lord Eglinton  
answered, that you might have right to  
carry a gun, but that you had no right to  
carry a gun upon his estate without his li-  
berty ; to which you replied, that *you beg-  
ged his Lordship's pardon*, but still persisted in  
refusing to deliver your gun ; and you, by  
striking your foot against a small stone,  
having fallen upon your back, when retir-  
ing, and keeping your gun pointed at Lord  
Eglinton, as above described, the muzzle  
of the gun came thereby to be altered in  
the direction from Lord Eglinton, and to be  
pointed near straight upwards ; and Lord  
Eglinton, who was only distant from you  
two or three yards, having stopped or stood  
still upon your falling, you, as soon as you  
could, recovered yourself, and resting upon  
your arm or elbow, aimed or pointed your  
gun to the said Alexander Earl of Eg-  
lington,

' linton, and wickedly and feloniously fired  
 ' it at him standing unarmed, *where he was*  
 ' *when you fell*, smiling at your accidental fall ;  
 ' and by the shot he was wounded in the  
 ' belly in a dreadful manner, the whole lead-  
 ' shot in the gun having been thrown into  
 ' his bowels ; of which wound the said Alex-  
 ' ander Earl of Eglinton died that night  
 ' about 12 o'clock ; and you the said Mungo  
 ' Campbell, after perpetrating so cruel,  
 ' wicked, and barbarous crime, did immedi-  
 ' ately run to one of Lord Eglinton's servants,  
 ' who had brought his gun from his coach,  
 ' and who was standing at some distance, and  
 ' *about to have loaded her*, and endeavoured  
 ' to wrest the gun from him, but was pre-  
 ' vented by the assistance of another ser-  
 ' vant ; and when the two servants were en-  
 ' gaged with you to defend the gun, and en-  
 ' deavouring to secure you, the Earl, who  
 ' was then sitting on the ground, called to  
 ' the servants to secure the man, for he had  
 ' shot him, but not to use him ill, or used  
 ' words to that purpose and effect ; and, upon  
 ' your being brought near to Lord Eglinton, he  
 ' said to yourself, ' Campbell, I would not have  
 ' shot you.' And you the said Mungo Camp-  
 ' bell, when carrying from the place where  
 ' you committed the foresaid crime to Salt-  
 ' coats, *being asked if you did not repent what*  
 ' *you had done*, answered in substance, that if it

was to do you would do it again, as you would  
 yield your gun to no person ; and being asked,  
 by those who attended you as a guard from Salt-  
 coats to the prison in Irvine, how you came to  
 shoot Lord Eglinton ? you gave an account of  
 the matter in substance as follows : that Lord  
 Eglinton having demanded your gun, which you  
 refused, you retired, having your gun cocked,  
 till you fell, when, upon lifting up your head,  
 and seeing a gun coming to Lord Eglinton,  
 you had shot him, believing, that if he had  
 got the gun, he would have shot you ; and  
 that it was better to shoot than be shot.  
 And the said Alexander Earl of Eglinton,  
 when within two or three hours of his death,  
 in giving an account to John Moore,  
 surgeon in Glasgow (who was called to give  
 what assistance he could in the way of his  
 profession) of what had passed between you  
 and him, did, in substance say, that you,  
 the said Mungo Campbell, did take an aim  
 at him, and shoot him wilfully ; and which  
 account of the matter was given by the  
 said Alexander Earl of Eglinton with the  
 greatest calmness, and without the least ap-  
 pearance of rancour or resentment of what had  
 happened, &c.

What is printed in the Italic character was  
 afterwards struck out by the prosecutors, and  
 printed copies of the indictment thrown off  
 without these passages in them ; and it is with

the indictment, so amended, that the panel has been served. But it will not be denied, and, if it is denied, it will be easily proved by the panel, that the indictment was so drawn at first, that it was so printed off at first, and that the printed copy herewith produced is one of the copies of the first impression then thrown off. The panel does not mean at present to argue upon the import of the alterations: it is very obvious; and consequently so must the reasons for making these alterations be.

JO. MACLAURIN.



